No. 1497

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLARD N. JONES and
THADDEUS S. POTTER,
PLAINTIFFS IN ERROR

vs.

THE UNITED STATES
OF AMERICA
DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

Brief of Defendant in Error

MARTIN L. PIPES,
S. B. HUSTON,
ATTORNEYS FOR PLAINTIFFS IN ERROR

FRANCIS J. HENEY,
Special Assistant to the Attorney General,
WILLIAM C. BRISTOL,
United States Attorney for District of Oregon,
ATTORNEYS FOR THE DEFENDANT IN ERROR

F. W. Baltes and Company, Printers, Portland, Oregon

No. 1497

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLARD N. JONES and
THADDEUS S. POTTER,
PLAINTIFFS IN ERROR

vs.

THE UNITED STATES
OF AMERICA
DEFENDANTS IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF OREGON

Brief of Defendant in Error

THE HISTORY OF THE CASE.

On the second day of September, 1905, an indictment was duly filed in the Circuit Court of the United States for the District of Oregon, charging the plaintiffs in error,

together with Wade, with violation of Section 5440 of the Revised Statutes as amended by the Act of May 17, 1879.

This indictment naming the plaintiffs in error, together with others, alleges and charges among other things:

I.

THAT THE PLAINTIFFS IN ERROR ON THE THIRD DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

III.

Those certain portions of its public lands situate, lying and being within the State and District of Oregon *which were open to homestead entry under the LAND LAWS of the United States AT THE TIME the respective homestead filings hereinafter mentioned were made thereon* at the local land office of the said United States at Oregon City in said State and District of Oregon.

(Here follows a description of the land, together with the names of the entrymen who made such homestead filings, and the date upon which such filings by such entrymen were made).

Transcript of Record, Pages 14, 15 and 16.

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants, Willard N. Jones and Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESI-

DENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants, Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID LAND SO FILED UPON BY HIM FOR THE PURPOSE OF SPECULATION AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

Transcript of Record, page 18.

VII.

(1) AND THAT IN PURSUANCE OF SAID CONSPIRACY AND TO EFFECT THE OBJECT THEREOF SAID DEFENDANTS, JONES AND POTTER, DID CAUSE AND PROCURE DANIEL CLARK TO MAKE A HOMESTEAD PROOF,

Transcript of Record, pages 19, 20 and 21.

AND A FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS,

Transcript of Record, pages 23 and 24.

AND THAT THE DEFENDANTS AND EACH OF THEM WELL KNEW THAT THE HOMESTEAD PROOF SO SUBSCRIBED BY CLARK AND HIS ANSWER TO QUESTION NUMBER 5 THEREIN WAS FALSE, IN THAT CLARK NEVER RESIDED UPON THE LAND AT ALL.

(2) That Ira Wade on the 5th day of September, 1902, certified to the foregoing testimony of Clark.

Transcript of Record, page 25.

(3) That on the 5th day of September, 1902, the defendants, Jones and Potter, caused, induced and procured Addison Longenecker to make final proof before Wade,

Transcript of Record, pages 25, 26, 27, 28 and 30,

and that said defendants, Jones, Potter and Wade, and each of them well knew at the time such homestead proof was so subscribed by Longenecker that his answer was false to question number 5, and that said Addison Longenecker had never resided upon said land at all.

(4) That on the 5th day of September, 1902, Ira Wade certified to the foregoing testimony of Longenecker.

(5) That Defendant Willard N. Jones on the 5th day of May, 1904, did cause and procure the following letters and affidavits to be sent to the Secretary of the Interior by Charles William Fulton, there and then the duly qualified and acting United States Senator for the State of Oregon, setting out the said letter of Fulton,

Transcript of Record, page 32;

the letter of Jones dated April 23, 1904, referred to in the Fulton letter of May 5, 1904,

Transcript of Record, pages 33 to 39;

the agreement between Jones and the entrymen,

Transcript of Record, pages 39 to 42,

attached to which there will be observed a confirmatory affidavit sworn to by Jones before George Sorenson, under date of the 23d day of April, 1904, in which Jones, a plaintiff in error, makes the following statement of fact:

"THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE FULL AGREEMENT SIGNED BY ADDISON LONGENECKER, DANIEL CLARK

AND GEORGE F. MERRILL, AND THAT THERE WAS NO OTHER VERBAL OR WRITTEN AGREEMENT EXPRESSED OR IMPLIED WHEREBY THEIR HOMESTEAD CLAIMS WOULD INURE IN WHOLE OR IN PART *TO ME,* EXCEPT AS IS STATED IN THE FOREGOING AGREEMENT."

Transcript of Record, page 43.

The indictment then concludes with the usual charge against the peace, dignity, etc., signed by the proper officers AND WITH THE NAMES OF THE WITNESSES ENDORSED THEREON.

On the 2d day of September, 1905, before the Honorable William B. Gilbert, United States Circuit Judge then presiding, the foregoing indictment was duly returned into court by the grand jury who, through its foreman presented the same, which indictment was then and there received by the Court and ordered to be filed.

Transcript of Record, page 45.

Ira Wade pleaded not guilty.

Jones and Potter filed a motion to set the indictment aside on the ground that the names of all of the witnesses examined before the grand jury were not inserted at the foot of the indictment.

Transcript of Record, page 50.

This motion was overruled September 25, 1905.

Transcript of Record, page 53.

Thereupon Jones and Potter united in the filing and submission of a plea in abatement and demurrer, which were submitted without argument. The demurrer is general, while the plea in abatement says, first, that the grand

jury was not legally in session; second, that it was adjourned until the 5th day of September, 1905; third, that it reconvened after its first adjournment and prior to the adjourned date at which it was to meet again without any order of Court, and there voted upon the indictment in question; and, fourth, that certain members of the grand jury were not present and were not notified and had no knowledge of the finding of the indictment. But it will be observed that this plea does not state that any member of the grand jury, if present, would not have voted for said indictment, or that he would have voted differently, or that it would have altered the result. In fact it is admitted in the brief of the counsel for the plaintiffs in error that the absent grand jurors would have voted for the indictment, and again, it is apparent from the plea in abatement that it is made upon legal grounds having to do with the technicality largely based upon said practice as to the convention and adjournment of the grand jury without regard to any question of fact being asserted or stated from which it might be adjudged that the defendants were in any wise prejudiced.

That this is apparent results from an examination of the agreed statement of facts (Transcript of Record, page 63) which was filed on the 28th day of October, 1905. This agreed statement of facts considered in connection with the plea in abatement demonstrates to a moral certainty the following facts:

That the grand jury which returned the indictment was composed of twenty members and that all of these members except one were present during the taking of the testimony which resulted in the finding of the indictment, and

that all of the members of the grand jury were present at the session at which said indictment was voted upon and that all the members then so present voted in favor of said indictment against Willard N. Jones.

It further appears that if the grand jury did anything they took a recess which, as a deliberative body, there can be no question at all of their right to do.

Transcript of Record, page 64.

That messages were then sent out convening them again shortening the recess, that of the twenty jurors who composed the grand jury, eighteen members who heard the testimony and who were present, voted in favor of the indictment against all the defendants.

It was also stipulated that there was no order of Court re-convening the grand jury on September 2, 1905, and that the plea in abatement might be decided and determined upon this agreed statement of facts.

Being so heard, the plea in abatement was overruled.

Transcript of Record, page 68.

Thereafter came on to be heard the demurrer, and it was likewise overruled.

Transcript of Record, page 71.

On October 3, 1905, the cause came on for trial (Transcript of Record, page 71), the trial continued for twelve or fifteen days, whereupon the jury returned a verdict finding the defendants, Jones and Potter, guilty as charged in the indictment.

Transcript of Record, page 86.

Motions for a new trial and arrest of judgment were duly filed and overruled.

On the 4th day of August, 1906, the defendant Jones was sentenced by the Court to pay a fine of two thousand ($2,000.00) dollars and be imprisoned for a term of one year at McNeil's Island, the defendant Potter was sentenced to pay a fine of five hundred ($500.00) dollars and be imprisoned for a term of six months in the county jail of Multnomah County.

Transcript of Record, page 93.

Supersedeas was granted as to both defendants.

Transcript of Record, pages 94 to 99.

On the 15th day of October, 1906, a writ of error was sued out and the case thereafter came to this Court upon the assignments of error.

Transcript of Record, pages 108 to 280, Nos. I to CLXIII.

And the writ of error issued February 2, 1907.

Transcript of Record, page 836.

The laws of the United States which made it possible for the transactions and things inveighed against by the indictment in this case are to be found in the Acts of Congress, August 15, 1894, 28 Statutes, 323 and 326; of May 17, 1900, 31 Statutes, 179; and of January 26, 1901, 31 Statutes, page 740.

Counsel for plaintiffs in error have apparently overlooked the course of this legislation, for they ground most of their complaints on the theory that the only Act of Congress in question in this matter is that of August 15, 1894.

It is a significant and very important fact that while tracing the course of this legislation it is seen that the very class of entrymen comprehended in the evidence in this case and who are named in the indictment, is the only class of individuals who could profitably and expediently avail themselves to the benefit of the conspirators in the acquisition of the lands comprehended by such legislation.

The Siletz Indian Reservation lands originally were open to entry in accordance with the provisions of the homestead laws by the payment on the part of the settler who should become an actual settler, of the sum of fifty cents per acre, together with the additional sum at the time of final proof of one dollar per acre, his final proof to be made within five years from the date of his entry and three years' actual residence required as prerequisite to title or patent.

The Act of August 15, 1894, provided in these particulars as follows:

"The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws, shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

These Siletz lands, because of the monetary consideration required, did not seem to be popular with those engaged in the business of acquiring land.

So we must look to the further legislation on the subject to find what was done in the matter. We refer to the Act of May 17, 1900, 31 Statutes, page 179, the relevant portion of which is contained in the following:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: *Provided,* That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect."

It will be observed that the dollar and a half per acre charged was wiped out and that the right to commute any such entry in the time and at the prices then fixed by existing law should, in respect of said lands, be in full force and effect. So, all the prospective settler had to do was to initiate his homestead entry, pay the fees of the land office,

reside for the period of three years and become entitled to his patent.

Congress, however, to remove all apparent doubt upon the subject, legislated more positively in this regard by the Act of January 26, 1901, 31 Statutes, page 740:

"CHAP. 180. An Act to allow the commutation of homestead entries in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of Section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries be, and the same hereby are, extended to all homestead settlers affected by or entitled to the provisions of the Act entitled 'An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose,' approved the seventeenth day of May, Anno Domini nineteen hundred: *Provided, however,* That in commuting such entries the entryman shall pay the price provided in the law under which the original entry was made.

"Approved, January 26, 1901."

In this state of the law several rulings were made by the General Land Office, some of which are referred to in the brief of the plaintiffs in error, but as we have not at hand a printed copy of such brief, we cannot cite the Court to the pages in question, but can say generally that the rulings of the land office referred to by the plaintiffs in error

are in cases designated by the names of the entrymen as follows:

Ex Parte Clara M. Allison, October 12, 1902.

Ex Parte Elizabeth Caplinger, February 3, 1902.

Ex Parte Ella I. Dickey.

Lamb v. Ellery.

But a much more important ruling of the General Land Office as bearing upon the design, plan and intention of the conspiracy charged in the indictment is that of Ex Parte Hattie C. Allebach, one of the soldier's widows used in the conspiracy charged in the indictment, given July 2, 1902 by W. A. Richards, Assistant Commissioner, as follows:

"Hattie C. Allebach.	Decision of January 28, 1902, recalled and modified on motion for review. Allowed thirty days to show cause why entry should not be cancelled.

"Register and Receiver,

Oregon City, Oregon.

"Gentlemen:

"August 17, 1900, Hattie C. Allebach, widow of Knox P. Allebach, deceased, made H. E. No. 12949, F. C. No. 6415, September 3, 1901, under Section 2307 U. S. R. S., for S. E. 1-4 Sec. 24, T. 9 S., R. 11 W.

"From the proof it appears that Mrs. Allebach never resided or made any personal act of settlement on the claim, but had about 1 1-2 acres cultivated for one season.

"The records of the War Department show that Knox P. Allebach served in the army during the Civil War and

was entitled to credit for three years (having been discharged on a surgeon's certificate of disability), which service, together with the time between date of entry and final proof, aggregate four years and seventeen days.

"By letter C of January 28, 1902, you were directed as follows:

"You will require entrywoman to appear before your office with any corroborating witnesses she may have, and testify orally as to whether she has performed any personal act of settlement upon the land, and if so, to state the facts in reference thereto in full. You will notify the special agent operating in your district, of the time and place for the taking of such testimony, and cross-examine such claimant and witnesses and also to ascertain by cross-examination or otherwise, whether or not the entry was made solely for the benefit of the entrywoman. The testimony and cross-examination must be reduced to writing by you and signed by the claimant and witnesses and transmitted with your report and recommendation in the matter.

"I am now in receipt of your letter of May 15, 1902, transmitting evidence of service of notice of my decision of January 28, 1902, upon the entrywoman, together with a motion for a review of the same, filed by F. P. Mays and Thad S. Potter, attorneys for applicant, April 10, 1902.

"The motion for review has been supported by argument of able counsel. It is contended that the case of Ella I. Dickey (22 L. D., 351), held that an entry made when the general circular of March 1, 1884, was in force, authorized the widow of a deceased soldier to complete a home-

stead entry made by her upon proof of cultivation in good faith without residence upon the land.

"The provisions of the said circular of 1884 are as follows:

" 'The ruling relative to the widow or minor children of a deceased homestead party as to actual residence (page 15), is equally applicable to the widow or minor children of a deceased soldier or sailor; if the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not reside upon the land.

" 'Counsel called attention to the words of the general circular of July 11, 1899, upon the subject, page 24, paragraph three, which are as follows:

" 'The ruling hereinbefore stated relative to the widow or minor children of another deceased homestead party as to actual residence is equally applicable to the widow or minor children of a deceased sailor or soldier; if the land is cultivated in good faith the law will be regarded as substantially complied with, although the widow or children may not actually reside upon the land.'

"It is contended that the similarity of the wording of the two circulars authorizes the widow of a deceased soldier now, as well as formerly, to complete her entry upon proof of cultivation in good faith alone.

"It appears, however, that in the decision in the case of Ella I. Dickey, supra, the Department found that: 'At the time this entry was made in 1887, the only expression of the Department as to the construction to be placed upon Section 2307 was that contained in the general circular of March 1, 1884, the circular then in force.'

"After quoting the requirements of the circular as to cultivation, showing substantial compliance with the law, the Department in said decision further held:

"This is the information that the Department has given to the public through the medium of its general circulars, and with the law as thus construed Mrs. Dickey has strictly complied.

"The decision of the Department then recites the holding in the case of Mary R. Leonard (9 L. D., 189), as follows:

" 'A departmental construction of a statute until revoked or overruled, has all the force and effect of law, and acts performed thereunder are entitled to protection.'

"However, the Department in said decision construes Section 2307 of the Revised Statutes under which the widow of a deceased soldier is authorized to enter public land and holds that the word 'settlement' therein means 'personal identification in some manner with the tract claimed.'

"The general circular does not now contain the 'only expression of the Department as to the construction to be placed upon Section 2307.' The departmental construction of said Section is more properly to be found in a formal decision than in a general circular.

"I further find that the lands applied for are within the former Siletz Indian Reservation, the disposition of which is provided for by the Act of August 15, 1894 (28 Stat., 326), which provides:

" 'The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under

the townsite law and under the provisions of the homestead law; Provided, however, That each settler under and in accordance with the provisions of said homestead laws, shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry and three years' actual residence upon the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.'

"Counsel contended that the words 'final proof to be made within five years from the date of entry and three years' actual residence on the land shall be established by such evidence as is now required by homestead proofs, as a prerequisite to title or patent' are not intended to modify the requirements of Section 2307 so as to require three years' actual residence by widow of deceased soldiers, and that the words 'shall be established by such evidence as is now required in homestead proofs' would include the right of the widow to prove compliance with the law by *by* cultivation under the requirements of the general circulars referred to.

"It seems that the general provisions of the homestead laws are modified by the proviso in the Act of August 15, 1894, supra, so as to require actual residence for three years upon the land instead of five years' actual or constructive residence under the general homestead law.

"In passing upon the question as to the right to make a soldier's addition H. E. for restored lands under certain

Acts, where restrictions were made for disposal of lands to actual settlers only, viz:

"Act of March 2, 1889 (25 Stat., 1005), that the 'lands shall be disposed of to actual settlers under the homestead laws only.'

"Act of May 2, 1890 (25 Stat., 81), that 'they shall be disposed of to actual settlers only,' and

"Act of March 3, 1893 (27 Stat., 363), 'they shall be disposed of * * * * * * to actual settlers only' it was held that the right to enter the lands therein referred to is expressly limited to *actual settlers* and that settlement thereon is obligatory and a condition precedent to entry. See letter "N" of October 23, 1900, to R. & R., Lewiston, Idaho, in Quasi Contest case No. 1910.

"In my letter C of February 3, 1902, to your office, in the case of Elizabeth Caplinger, involving H. E. No. 13118, made by William Caplinger on October 6, 1900, for S 1-2 SE 1-4, E 1-2 NE 1-4 SE 1-4, SE 1-4 SW 1-4, and Lot 4, Section 15, T. 9 S., R. 10 W., Siletz Indian Reservation lands, it was held that three years' actual residence is required of homestead settlers on these lands as a prerequisite to title or patent, and that the military service of the deceased entryman could not be accepted in lieu of residence.

"Mrs. Allebach's entry appears to be illegal, and you will notify her that she will be allowed thirty days from service of notice within which to show cause why her proof should not be rejected, and the final certificate cancelled.

"Serve notice and make report in accordance with circular of March 1, 1900 (29 L. D., 649).

"My decision of January 28, 1902, is recalled and modified as above. Very respectfully,

"W. A. RICHARDS,

"E. B. H. Assistant Commissioner."

It is not, therefore, as stated in the brief of the plaintiffs in error, the law, nor was it the law at the time, that soldiers' widows could file upon a homestead and make final proof without ever going upon the lands comprehended in this indictment.

Now let us see what happened as a matter of historical retrospect, demonstrated by the evidence adduced in this case without objection. Eleven soldiers' widows under the facts testified to by Wells (Transcript of Record, pages 848 and 849) on the theory that they were entitled to land without settlement, were selected for the purposes set forth in the indictment.

The fact then before the conspirators was that the Commissioner of the General Land Office had held, in passing upon the application of Elizabeth Caplinger and Hattie Allebach to make final proof upon homesteads in the Siletz Reservation, that military service could not be applied as residence upon such a homestead, but that three years' actual residence was required.

The record discloses that Wells turned his hand to getting soldiers to file, although he does not state which of the defendants, either Jones or Potter, spoke to him about the soldiers, but his recollection was that Mr. Potter spoke first (Transcript of Record, page 850), and that he then went to soldiers and told them about the homestead propo-

sition and that they were to go to Mr. Jones and Potter and enter into a contract, if they wished to do it that way, or they could sign a contract before Wells and he would hand it to either Jones or Potter, and that some of them signed the contract before a witness, but most of them before Mr. Jones and Mr. Potter, and that he informed these persons, who are the same persons mentioned in the indictment, that if they had served two years in the army *they would only have to hold the homestead about twelve or fourteen months before they could prove up, and that Mr. Jones would pay them two hundred dollars for their right.*

Transcript of Record, pages 852 and 853.

So, we find upon reference to the evidence adduced in the cause, that twenty-six entries by old veteran soldiers who were picked up by Wells and the other coadjutors acquainted with the plan, on the theory that they would become entitled to deduct their time of service in the army from the actual time required by the Act of August 15, 1894. But the evidence also discloses that the land office held in these respects that having already reduced the time from five years to three, and given them the right of commutation beside under the Act of 1901, they should be held to the terms of the statute.

Now, what did they do?

See the colloquy between Court and counsel (Transcript of Record, pages 853 and 854), and then the resumption of the testimony by the witness (Transcript of Record, page 855), where he reiterated what it was that Jones and Potter told the witness to tell the soldiers, which evidence

came in without any objection and which was to the effect that what Jones and Potter told Wells to tell the soldiers was *that if they filed upon the lands, that Jones would pay all the expenses and that they were to give a mortgage back to Jones for the expenses and that Jones was to pay them two hundred dollars besides.*

Transcript of Record, pages 855 and 856.

We find in further examination of the record that the testimony discloses that when the entryman went to file on this land Jones went with him (Transcript of Record, page 858), and *that Jones paid the fare* of the persons named to Oregon City and gave them the description of the land, and that some time after when they went down on the land *Mr. Potter notified them the time to go.* They were met at the Southern Pacific West Side depot and there were about twenty of them with Mr. Potter present. *Potter paid their expenses* and when they arrived at Toledo *Potter paid their expenses* at the hotel and they went into the land by teams furnished by Potter; that they were shown their claims and did not remain any time; that they found cabins on the claims and that on the return trip *Mr. Potter paid their expenses* and *their hotel bills* and *accompanied them when they took the train to Portland. When they came back to Portland Mr. Jones was seen and informed* that these entrymen were down there and that most of the boys went to their claim and *that Mr. Jones was told that some of them remained* down there.

Transcript of Record, pages 859, 860 and 861.

It furthermore appears from the testimony introduced without objection, that the next time, within less than six

months, they were *notified to go down to the claims by Mr. Jones* and *that the expenses were to be paid by Mr. Jones* (Transcript of Record. pages 861 and 862) ; and that when they came back from that trip another *report was made to Mr. Jones* and the *expenses of the trip were shown and Mr. Jones was informed of the weather and how difficult it was to get to the claim and that Jones gave him enough money to pay the expenses there and back.*

Transcript of Record, pages 864, 865 and 866.

At the conclusion of this trip the evidence shows that they came back to Portland and that *the trip was reported to Jones and Jones was given an itemized statement of the expenses;* that the last time they went down was in August, 1901.

Transcript of Record, page 870.

An examination of the Transcript of Record, pages 874, 877, 878 and 879, shows from the testimony of one of the entrymen the evidence that *Potter directed what answers were to be given to the questions asked in the proofs, and that Potter interrogated the entrymen concerning the interview he had with Loomis, and that after he returned to Portland he saw Mr. Jones;* that the executed a mortgage and that the arrangement he had between Mr. Jones and himself was that he was to turn the land over to Mr. Jones and get two hundred dollars for it.

The colloquy then ensuing between Court and counsel (Transcript of Record, pages 879 to 884), places a limit upon the exceptions discussed in the brief of the counsel for the plaintiffs in error in respect of the fact that the question before the Court was whether the demand for the

production of the deed to Jones then traced to Jones' possession, was justified by the evidence and it was then adduced that *Mr. Potter was assisting around at the time of making proofs and took a seat at the Clerk's desk* at the time the proof was being offered.

Transcript of Record, page 886.

That Mr. Jones had introduced him to Mr. Potter (Transcript of Record, page 893) ; *that Mr. Jones and Mr. Potter were working together* (Transcript of Record, page 894), and that Mr. Potter informed him that *Judge Galloway was a friend of the old soldiers and that the proof would go through all right* (Transcript of Record, page 895), and *that Mr. Potter suggested to them to take the proof and instruct the others what to say in each of the questions and that some of the entrymen were spoken to about it and an endeavor made to tell them just what Potter had instructed him to say;* that he knew what answer was required *and that Potter had instructed him as to the form of answer to tell the soldiers to make.*

Transcript of Record, page 896.

It is to be observed by reference to the pages of the Transcript last referred to and to the matter following on pages 897 and 899 showing the conscious participation of the defendants, that no objection was made or offered to the testimony.

These facts are the subject of corroboration by other witnesses.

Addison Longenecker, Transcript of Record, pages 919, 920, 921, 924 and 926.

On further occasion this witness testified that when they were at Toledo their names were called off and *Mr. Jones said they were to go down to Portland and that they then came down to Portland and went up to his office and signed a whole lot of papers.*

This testimony is likewise corroborated by an entryman by the name of George F. Merrill.

Transcript of Record, pages 940, 954, 955.

James Landfair (Lamphere, Landphier), another witness, gave like testimony.

Transcript of Record, pages 974, 982.

We then come to the testimony of George J. West, who stated that he filed on a piece of land in the Siletz Reservation and that he talked with Jones and Wells about it, and that he was told, and so were the other soldiers, that they would only have to go up every six months and that it would be a little outing trip every six months, as he had been in the service so long; that he made final proof when Mr. Potter was at Toledo.

Transcript of Record, pages988 and 989.

Jones asked Sisler if he could put some timber land in Sisler's name as a temporary matter, and that Jones told him they were in the Siletz country and that he had afterward put them in his, Sisler's, name.

Transcript of Record, page 993.

These transfers are well illustrated by reference to the Record at pages 995, 997, 998.

In addition, there were settlements *made by Jones* of

certain contests against filings thus initiated by Potter, Wells and Jones.

Transcript of Record, pages 1022, 1025, top of pages 1026, 1027 and 1028.

The defendants called as a witness Charles F. Moore, who was Register of the Land Office at Oregon City, (Transcript of Record, page 1031), and he testified that in all the proofs offered and shown in the case that he, as an officer, had made sure that the witnesses understood everything, and it was shown in evidence that the requirements of the homestead law, among other things, were actual residence in a house upon the land and a cultivation continuously **and that occasional visits within periods of six months or oftener did not constitute residence.**

Transcript of Record, page 1033.

From an examination of each and all of the proofs it appears that the entrymen and their coadjutors and conspirators were well advised of the rulings of the Department.

See the letter of James Landfair, Transcript of Record, page 487, dated November 14, 1904, prior to the time that the indictment was returned, addressed to Landfair in the care of Potter, and see also Transcript of Record, pages 480 and 483.

There are many other instances of like kind. It is also to be observed that there were commutation affidavits filed, a fair sample of which is found in the Record at page 467, in which Landfair states among other things:

"Not wishing to continue his residence upon said claim

for the full three years, he at this time desires to commute his claim under Act of Congress of January 26, 1901."

This affidavit is dated on the 10th day of October, 1902. It is to be observed that this is some thirty days after the period named in the indictment.

See Transcript of Record, page 467, Government's Exhibit No. 123.

It is to be observed that all of the evidence is not in the record. The bill of exceptions does not purport to give all of the evidence, nor is it so certified.

Transcript of Record, page 1086.

It cannot, therefore, be presumed that there was not other evidence equally forceful substantiating the government's case and submitted to the jury. The purpose of the foregoing statement is to point out to the Court the fallacy of the position of the plaintiffs in error, pages 76 and 77 of their brief, where it is stated to the Court on page 77, after citing some of the proofs in question:

"So it appears that not one of these entrymen proved or attempted to prove that he had resided upon the land for the period required by law, and that THERE WAS NO POSSIBILITY OF THE GOVERNMENT BEING DEFRAUDED BY REASON OF THESE PROOFS."

The obvious facts shown by the foregoing history of the case are that each and every entryman availed himself of the provisions of the Act of August 15, 1894, repealed, modified and amended by the Act of May 17, 1900, and again repealed and modified by the Act of January 26,

1901, according and giving the right of commuting the very entries under which the counsel for plaintiffs in error are now attempting to have this Court believe could only be made on a proof of three years' previous residence; but which could be made and were in fact made on the basis of fourteen (14) months' *actual* residence, measured by six months' *constructive* residence by going on the land once over night every six months, after the first six months allotted by law within which to establish a residence. So, we have, therefore, the spectacle of a *"three years' actual residence"* requirement under the law disappearing to revive again in a designed and obviously fraudulent make-shift of one trip in six months without domicile or cultivation. To help the old soldiers? No. **The purpose was to defraud the United States of the possession of its lands.**

POINTS FOR DISCUSSION.

Counsel for plaintiffs in error have kindly furnished one of the counsel for the government with the proof sheets of their brief. It is not paged and necessity therefore arises to refer to the matter discussed by headings rather than by specific references to brief pages. *The brief of the plaintiffs in error does not contain any specification of the errors relied upon and intended to be urged.* There are 163 asignments of error and it is impossible within the limits of a brief or the time at the disposal of counsel to discuss all possible features of the case.

Without limiting, however, any presentation that the Government may have to present, either orally or by brief, reserving the right to apply to the Court at any time to file a supplemental brief herein, we take up seriatim the various subheads which counsel have discussed, as appears from the proof sheets of the brief furnished by them, assuming that counsel for plaintiffs in error, have abandoned all other assignments of error, there being no specifications of errors as pointed out, *under the requirements of Rule 24 of this Circuit.*

We will, therefore, divide this brief as follows:

I.

In criminal cases in the Federal Courts state laws do not control and state decisions have no application.

II.

The motion to quash the indictment was properly overruled. The local state statute and practice does not govern.

III.

The plea in abatement was properly overruled.

IV.

The demurrer to the indictment was properly overruled and the indictment in this case is sufficient to fully and fairly apprise the defendants of the charge they shall be called upon to meet.

V.

The statute of limitations.

VI.

The admission of evidence and rulings thereon and instructions of the Court.

VII.

Argument.

IN CRIMINAL CASES IN THE FEDERAL COURTS STATE LAWS DO NOT CONTROL AND STATE DECISIONS HAVE NO APPLICATION.

The law administered in criminal cases in the Federal Court is entirely federal, the entire jurisdiction is statutory and the state law has no application.

United States v. Reid, 12 How. 363;
Jones v. United States, 137 U. S. 211;
Manchester v. Massachusetts, 139 U. S. 262;
Starr v. United States, 153 U. S. 625;
Allis v. United States, 155 U. S. 124;
Simmons v. United States, 142 U. S. 148.

Furthermore, the statute adopting the state laws as rules of decision does not apply to criminal prosecution in the Federal Courts.

United States v. Reid, 12 How. 363;
Logan v. United States, 144 U. S. 301;
United States v. Hall, 53 Fed. 353;
United States v. Coppersmith, 4 Fed. 205;
United States v. Baugh, 1 Fed. 788;
Lang v. United States, 133 Fed. 204.

Concrete instances might be multiplied illustrating principles within the above cited cases where the Federal Courts have refused to follow the State law:

The law against the offense of larceny cannot be enforced according to the State law.

United States v. Stone, 8 Fed. 239.

Another instance is the enforcement of the law against murder.

United States v. Clark, 46 Fed. 635.

Revised Statutes Section 1021 provide that any indictment may be found or any presentment may be made with the concurrence of at least twelve grand jurors.

In another case the competency of a witness to testify in a murder case was held to depend upon the determination of the Federal tribunal and not upon the State law.

United States v. Hall, 53 Fed. 353.

So, notwithstanding that State Courts require the jury to be kept together, it was held not ground for a new trial in the Federal Courts where that precaution was omitted.

United States v. Davis, 103 Fed. 457.

Under Revised Statutes Section 1025 it is provided that defects in form should be disregarded and that no indictment in any criminal case nor the trial judgment or other proceedings thereon be deemed insufficient or defective by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant—*it is even held* that the fact that the above rule obtains in the State Courts does not affect the above section.

United States v. Malloy, 31 Fed. 19.

THE MOTION TO QUASH THE INDICTMENT WAS PROPERLY OVERRULED. THE LOCAL STATE STATUTE AND PRACTICE DOES NOT GOVERN.

The dicta referred to by counsel for the plaintiffs in error in their brief excerpted from the case of *United States v. Mitchell,* 136 Fed. page 911, applies to the organization of grand juries only, as that was the matter before the Court; and the case is therefore not in point upon the precise question presented by the motion to quash.

The questions presented in the present motion to quash referred to in the brief of plaintiffs in error, have been before this Court several times.

In the case of *Shelp v. United States,* 81 Fed. 694, a case in this Court June 7, 1897, opinion by District Judge Hawley, where under the statutes of Oregon it was contended that the names of witnesses examined before the grand jury must be inserted at the foot of the indictment, Judge Hawley said:

"This statute has no application to this case. There is no statute which requires a list of the witnesses to be furnished to a person indicted for a misdemeanor. If the indictment is not for a capital offense the defendant is not entitled as a matter of right to a list of witnesses or jurors."

Shelp v. United States, 81 Fed. top of page 697.

In *Ball v. United States,* 147 Fed. 32, decided by this Court June 18, 1906, and a rehearing denied October 29, 1906, opinion by Circuit Judge Gilbert, this Court held, where it was assigned as error that the Court overruled the motion of the plaintiff in error to require the District Attorney to furnish the list of all the witnesses produced before the grand jury:

"That statute applies only to the trial of treason and capital cases in Courts of the United States."

In *Thiede v. Utah Territory,* 159 U. S. 510-515 the Court said:

"In the absence of some statutory provision there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial."

The Circuit Court of Appeals for the Eighth Circuit is also in accord with these facts, for in *Balliet v. United States,* 129 Fed. 689, opinion delivered by Circuit Judge Thayer, it is held by that Court that the statutes of the United States authorize the examination of witnesses in trials in the Federal Courts for lesser crimes than treason or capital offenses **without such witnesses being previously disclosed to accused.**

THE PLEA IN ABATEMENT WAS PROPERLY OVERRULED.

The main ground which counsel for plaintiffs in error make on their plea in abatement is that the grand jury was not in legal session at the time the indictment in this case was returned.

In the "History of the Case," given in the previous pages of this brief, attention was called to the fact that there was an agreed statement of facts (Transcript of Record, page 63), in which statement of facts it was stipulated that there was no order of Court re-convening the grand jury on September 2, 1905, when the indictment was returned, and that on the first day of September the grand jury on its own motion took a recess to Tuesday, the 5th day of September, 1905.

It is claimed because of this that the grand jury was not in legal session and that it had no authority to re-convene itself. Counsel for plaintiffs in error have attempted by analogous reasoning to show that the grand jury is to be likened to the board of directors of a corporation. There can be no such comparison from the standpoint of any legal ground. The reason is obvious.

From time immemorial in the Federal Courts, reviewing some of the cases back as far as 1789, the practice was, and has since crystallized into the doctrine, for the expedition of public business, that a Federal grand jury when properly convened meets and adjourns at its own convenience and sits upon its own adjournments, and is **only discharged by the final adjournment of the Court or by the Court's order.** In addition to this many cases

are found in which grand juries have before the final adjournment of the Court been discharged but were again summoned and instructed by the Court to consider matters found in which grand juries have before the final adjournment of the Court been discharged but were again summoned and instructed by the Court to consider matters which had arisen since their discharge but before the adjournment of the term, and their action in this behalf was held valid. The procedure in the State Courts where, if at all, technicalities are most countenanced, has been examined, and it is found that many States having extremely rigid provisions with respect to actions of a grand jury endorse the doctrines above expressed.

In *Nealon v. People,* 39 Ill. App. 481, on the precise question made by counsel for plaintiffs in error, it is there held that a grand jury, without reference to the temporary adjournment of the Court, when properly organized may meet and adjourn upon its own motion and may lawfully proceed in the performance of its duties whether the Court is in session or not until the final adjournment of the term.

Nealon v. People, 39 Ill. App. 481;
In re Gannon, 69 Cal. 541;
State v. Reid, 20 Iowa 413;
Olmer v State, 14 Ind. 52;
Long v. State, 46 Ind. 582;
Commonwealth v. Wood, 76 Mass. (10 Gray) 477,

where, indeed, without examining witnesses anew, the jury found an indictment and substituted for another indictment found by them on investigation of the facts at a previous term.

Furthermore, an indictment is not vitiated by the improper discharge of a juror, provided that the number necessary to find an indictment remain.

Gladden v. State, 12 Fla. 562;
United States v. Belvin, 46 Fed. 381;
Smith v. State, 19 Tex. App. 95;
Watts v. State, 22 Tex. App. 572;
Portis v. State, 23 Miss. 578;
State v. Wilson, 85 Mo. 134;
Commonwealth v. Burton, 4 Leigh (Tenn.) 645.

The Federal statutes, Revised Statutes, Section 1021, provide that for the return of any indictment twelve jurors must concur. The plea in abatement in this case does not negative the fact that twelve jurors did concur.

State v. Copp, 34 Kans. 522;
Watts v. State, 22 Tex. App. 572;
State v. Ostrander, 18 Iowa 435;
People v. Hunter, 54 Cal. 65;
United States v. Standard Oil Company, 154 Fed. 728, 734,

all of which cases hold that, although some juror may have been absent or excused, yet where twelve concur the indictment is valid. Furthermore, the Supreme Court of the United States, In re Wilson, 140 U. S., page 581, speaking through Justice Brewer, says, on page 581:

"IF THE TWO HAD BEEN PRESENT AND HAD VOTED AGAINST THE INDICTMENT, STILL SUCH OPPOSING VOTES WOULD NOT HAVE PREVENTED ITS FINDING BY THE CONCURRENCE OF

THE TWELVE WHO DID, IN FACT, VOTE IN ITS FAVOR. IT WOULD SEEM, THEREFORE, AS THOUGH THE ERROR WAS NOT PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE PETITIONER."

In re Wilson, 140 U. S. 575-581.

Furthermore, Section 1025 of the Revised Statutes applies as well to irregularities in procedure as to deficits in form of indictment.

United States v. Cabban, 127 Fed. 713.

THE DEMURRER TO THE INDICTMENT WAS PROPERLY OVERRULED AND THE INDICTMENT IN THIS CASE IS SUFFICIENT TO FULLY AND FAIRLY APPRISE THE DEFENDANTS OF THE CHARGE THEY SHALL BE CALLED UPON TO MEET.

In the first place, and at this stage of the case, it is the rule in this Circuit that an indictment when attacked after verdict shall receive a liberal construction.

United States v. Dimmick, 112 Fed. 352, a decision, November 23, 1901, by District Judge DeHaven.

"Subtle reasoning is no longer permitted to obstruct the course of justice. It would result in refining all common sense out of the law and in the adoption of rules too technical and minute for the social conduct of men."

In re Rowe (Circuit Court of Appeals), 8th Circuit, 77 Fed. 166.

"If the sense be clear, nice exceptions ought not to be regarded, in respect of which Lord Hale (2 Hale's P. C.

193) says that 'more offenders escape by the overeasy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offenses escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy and the dishonor of God.' "

Lehman v. United States (Circuit Court of Appeals), 2nd Circuit, 127 Fed, pages 45 and 46.

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

Aiken v. Wisconsin, 195 U. S., top page 206.

After verdict no indictment shall be deemed insufficient for any defect which shall not tend to the prejudice of the defendant.

Rev. St. U. S., Sec. 1025;
United States v. Rhoades, 30 Fed. 431, 434;
United States v. Chase, 27 Fed. 807;
Connors v. United States, 158 U. S. 408, 411;
Price v. United States, 165 U. S. 311, 315;
Wright v. United States, 108 Fed. 805, 810;
United States v. Dimmick, 112 Fed. 352, 354.

"An informal or imperfect allegation of an essential fact will be deemed a sufficient averment of such fact" after verdict.

United States v. San Francisco Bridge Co., 88 Fed. 893;
United States v. Noelke, 1 Fed. 426, 431, 432.

Whatever defects then exist not consisting in the *total want* of essential averments are cured after verdict; and if the indictment read in the light of ordinary understanding and intelligence apprises the defendant of the charge against him, it is sufficient.

Markham v. United States, 160 U. S. 319, at p. 325;
Lehman v. United States, 127 Fed., pages 47 and 48.

In this respect it is also to be noted that the Supreme Court of the United States has laid down the rule that the Government is not to be entrapped into making allegations of an impracticable standard of particularity, and that averments which convey a general understanding of the crime charged (in this case, conspiracy) are sufficient.

Evans v. United States, 153 U. S. 584.

See also,

United States v. Eddy, 134 Fed. 114, 116, 117.

"The true test of the sufficiency of the indictment is whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and shows to what extent he may plead former acquittal."

And further to the same point, the Supreme Court of the United States holds as follows:

"Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described

in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. **Where the statute completely covers the offense, the indictment need not be more complete by specifying particulars elsewhere obtained."**

Ledbetter v. United States, 170 U. S., 606, page 612.

"It is equally true that the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. **The accused was not entitled to more nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment.** The words of the indictment directly and without ambiguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning and according to the rules of pleading, THE DEFENDANT WAS INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM."

Burton v. United States, 202 U. S. 344, page 372.

Looking particularly to the recognized rules of criminal pleading, the practical interpretation given by long usage to indictments is that words such as "knowingly and wilfully," and hence the words, "knowingly, wickedly and cor-

ruptly," apply to all which follows them, although the grammatical connection is not strictly made.

United States v. Adler, 49 Fed. 736.

Blake v. United States, 71 Fed. 286, middle of page 290;

United States v. Nathan, 61 Fed. 936, 938;

Browne v. United States, 145 Fed., page 1, all of the matter in the last paragraph of page 5.

Observing the rule that these words used in an indictment are to be construed grammatically as qualifying all of the matter thereafter charged, it likewise follows that they must be read in connection with, and entirely through this indictment.

Judge Deady says, in

United States v. Thompson, 31 Fed. 331, at page 335, bottom of page.

"Commenting upon the case of Commonwealth v. Douglas:

"The allegation in the indictment, 'The defendant suborned the said Fanny Crosman to commit perjury'—in my judgment this charge covers the whole ground and by a necessary implication includes all the elements of the crime of subornation of perjury."

(United States v. Thompson, page 335.)

In respect of the same matter, Judge Hammond, of the Western District of Tennessee, in his famous opinion in the case of

United States v. Howard, 132 Fed. 325,

commenting upon the case of United States v. Thompson, *supra*, says, on pages 352 and 353:

"For, while the indictment did not state in detail the facts of the subornation, it did state that the defendant knew that the witness would swear falsely and commit the crime of perjury, from which it necessarily follows by implication *that he knew that the oath on the part of the witness would be wilful.*"

United States v. Howard, 132 Fed., top of page 353;
United States v. Cobban, 134 Fed. 293.

It may be well assumed after verdict that all the necessary facts appeared in evidence and that the accused was not ignorant of the nature of the inquiry or of the charge to which his actions related and to which the indictment referred, and the indictment, within the principles set forth, reasonably presented to the common understanding all the necessary elements of the gist of the offense, together with all the equivalents of the offense in plain language, which he, with others, conspired to commit, satisfies every reasonable rule of the law.

Markham v. United States, 160 U. S. page 325;
United States v. Eddy, 134 Fed. 114;
United States v. Clark, 37 Fed. 107;
Noah v. United States, 128 Fed. 270, at page 272, a decision of this Court delivered by Presiding Judge Gilbert.

It is urged by the plaintiff in error that the agreement entered into was not enforceable, but this Court has held that that makes no difference.

Boren v. United States, 144 Fed. 801, 804, 805.

The essentials of a conspiracy are mutual assent, con-

scious participation or a combining of two or more minds coupled with the purpose sought.

"Conspire" is a word in common use, which necessarily carries with it the idea of agreement, concurrence and combination; and when one person is charged with conspiring with another there are no words in the English language by which the idea of action and co-operation of two minds could be more effectively conveyed, since one cannot agree or conspire with another who does not agree or conspire with him.

State v. Slutz, 30 South. 298, 299, 106 La. 182.

The **"means"** *in a conspiracy case under the second division of the statute* "to defraud the United States in any manner or for any purpose," *are not required to be alleged, and are immaterial.*

In *United States v. Gordon,* 22 Fed. 250, the Court says, page 251:

"The first count is good. The section of the statute (5440) makes it a crime to conspire to defraud the United States in any manner, and the cases cited from the state courts which hold that a conspiracy to defraud is not criminal, unless it is a conspiracy, to defraud in a manner made criminal by statute, have no application to indictments under Section 5440. **It is immaterial what means were used to defraud, as it is criminal to conspire to defraud the United States in any manner or for any purpose,** and the Court does not care to know whether the modes adopted to accomplish the end proposed is made criminal or not. The second count is

sufficiently clear in its statements, and the acts which it is alleged the defendant conspired to do would defraud the Government. Each count is followed by allegation of a large number of acts done in pursuance of and to effect the object of the conspiracy, and these allegations are identical. I think the lands are sufficiently described, and the defendant is reasonably informed of the particular instances intended and referred to. The third count is good. It charges with sufficient particularity that the defendant, with others, conspired to defraud the Government out of the land by a pretended compliance with the pre-emption laws at the Duluth land office, in which district the lands are situated. The fourth count is good. It charges that the defendant and others conspired to defraud the Government out of the lands by a pretended compliance with the pre-emption laws, for the purpose of selling them to the defendant. It charges a contrivance to secure the privilege of pre-emption, and a combination to defraud the Government."

In *Sprinkle v. United States,* 141 Fed. 815, the Court adopts Mr. Wharton's doctrine as follows:

"'The means of effecting criminal intent,' says Mr. Wharton, 'or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury, to demonstrate the intent, and not necessary to be incorporated in the indictment.' 1 Whart., § 292."

See also—

United States v. Dennee, 3 Woods, 47.

United States v. Goldman, 3 Woods, 187.

The Circuit Court of Appeals for the Eighth Circuit, in the case of

Stearns v. United States, Feb. 1, 1907, 152 Fed. 900,

to face page 904,

speaking through Circuit Judge Van De Vanter, said:

"We are aware that there is persuasive authority for the "position taken by the learned judge who presided at the "trial, that under section 5440 the means of effecting the "object of the conspiracy do not constitute an element of "the offense and need not be stated in the indictment, or, "if stated, need not be so fully described or so supple-"mented by the statement of other matters as to make their "adequacy apparent. United States v. Dustin, 25 Fed. "Cas. 944, No. 15,011; United States v. Dennee, 25 Fed. "Cas. 818, No. 14,948; United States v. Gordon (D. C.), "22 Fed. 250; United States v. Benson, 17 C. C. A. 293, "298, 70 Fed. 591, 596; Gantt v. United States, 47 C. A. A. "210, 108 Fed. 61. See, also, United States v. Cruick-"shank, 92 U. S. 542, 558, 23 L. Ed. 588; Pettibone v. "United States, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. "Ed. 419; Dealy v. United States, 152 U. S. 539, 544, 14 "Sup. Ct. 680, 38 L. Ed. 545."

Now, these plaintiffs in error with all subtility and acumen able counsel can furnish, wish to overturn the foregoing principles on the assertion that the evidence discloses the *"means"* alleged to be ineffective.

Well, this position admits "means" alleged, and we shall show them to be sufficient to defraud the United States.

Competent allegations of knowledge are in the indictment (see, *ante*, this brief "History of Case," pages V and VII), but with reference to this matter of a "**Scienter**" the Circuit Court for the District of Oregon has *already* decided in the case of United States v. Mitchell, 141 Fed., page 666, speaking through District Judge Hunt, as follows:

"An indictment under Revised Statutes §5440 (U. S. Comp. St. 1901, p. 36761), which charges that defendants knowingly, unlawfully, wickedly and corruptly conspired to defraud the United States out of its title to certain public lands by means of false, fraudulent and fictitious entries of the same under the land laws, and that in pursuance of, and to effect the object of, such conspiracy, certain acts set forth were committed by one or more of the defendants, is not insufficient because it does not expressly aver that such acts were done with knowledge of the fraudulent and illegal character of the entries. The essence of the offense is the conspiracy, and while an overt act is an essential element under the statute, the use of the word 'knowingly' in charging the conspiracy must fairly be held to apply to and characterize the acts specifically charged to have been done in furtherance of such conspiracy, and for the purpose of carrying it into effect."

In the United States v. Stone, 135 Fed., page 392, it was held that the indictment under Section 5440 in conspiracy to defraud the United States need not aver an intent upon the part of the accused, for the intent to defraud will be inferred from the matter set out in the indictment. *The distinction between a conspiracy to commit an offense and*

a conspiracy to defraud the United States is well pointed out on page 297 *of the same Reporter in this case,* and the Court in considering another case from this Circuit on page 398, uses this language:

"In United States v. Thompson (C. C.), 29 Fed. 86, it was held that the section as it now stands 'must be construed to include every conceivable case of conspiracy to defraud the United States; that is, to deprive or divest it of any property, money, or anything otherwise than as the law requires or allows.' "

Everyone is presumed to know the natural consequences of his own acts. The persons, therefore, referred to in the indictment could not have been induced and persuaded without knowing whereof and what for, nor could it have been possible, considering the workings of the mind, for anyone to persuade or induce another without knowing what he was persuaded and induced about.

"If previous to this forming of their unlawful common design or understanding, if one ever was formed, defendant Newton, or any other person, had been doing the very act which afterwards by being committed to effect the conspiracy, ripened the statuory crime of conspiracy, then there would be the guilty participation necessary to the crime."

United States v. Newton, 52 Fed 285.

The doctrine for which the government here contends, that an indictment under Section 5440 of the Revised Statutes need not aver with exact accuracy the date of the formation or the beginning of the conspiracy nor that it

be proven that the conspiracy was formed and begun at the date given in the indictment, but that *the essential point is that the conspiracy existed before the date of the overt act charged and continued to exist at the time the overt act was committed, is fully upheld in*

Bradford v. United States, 152 Fed. 617.

United States v. Newton, 52 Fed., top page 284.

United States v. Potter, 56 Fed. 97.

United States v. Francis, 144 Fed. 521, at page 524.

The offense constituted by Section 5440 of the Revised Statutes consists of the combination, plot or agreement and the acts done by either or any of the parties thereto to carry the combination, plot or agreement into execution and effect its ultimate purpose.

United States v. Cole, 153 Fed. 801.

Ware v. United States, 154 Fed. 577.

The conspiracy statute of the United States defines an overt act as *"any act."* It may be innocent. It may be lawful. Any act can be taken which of itself, or with other facts or acts, tends to effectuate, render more certain of accomplishment the general plan conceived originally.

In the case of

United States v. Donau, 11 Blatchf 168, 25 Fed. Cases 890,

Judge Benedict says:

"The offense is the conspiracy. Some act by some one of "the conspirators is required to show, not the unlawful "agreement, but that the unlawful agreement while sub- "sisting became operative. The offense of conspiracy is

"committed when to the intention to conspire is added the "actual agreement, and this intent to conspire coupled "with the act of conspiring completes the offense intended "to be created by the statute, notwithstanding the re- "quirement that the prosecution show by some act of some "one of the conspirators that the agreement went into "actual operation. **If then, an indictment correctly "charges an unlawful combination and agree- "ment as actually made, and, in addition, de- "scribes an act by any one of the parties to the "unlawful agreement as an act intended to be "relied on to show the agreement in operation, "it is sufficient, although upon the face of the "indictment it does not appear in what manner "the act described would tend to effect the "object of the conspiracy."**

In a recent case the Circuit Court of Appeals for the Eighth Circuit on April 29, 1907, had occasion to consider what constituted in law a "continuing offense" and in the case of Armour Packing Company v. United States, the Court, speaking through Circuit Judge Sanborn, said:

"A continuous offense is a continuous unlawful act, *or series of acts set on foot by a single impulse and operated by an intermittent force,* however long a time it may occupy."

Armour Packing Co. v. United States, 153 Fed Rep., page 5, bottom of page 5.

Considering the indictment, however, from the viewpoint of the criticisms of the plaintiffs in error, we bring to it the light of modern adjudged cases, and submit that fair

examination shows the indictment good within the following cases:

Dealy v. United States, 152 U. S. 546 and 547;
Gantt v. United States, 108 Fed. 61, page 62;
Wong Don v. United States, 135 Fed. 704, 705;
United States v. Benson, 70 Fed. 591, at page 596;
United States v. Curley, 122 Fed. 738;
United States v. Curley, 130 Fed. 1;
McGregor v. United States, 134 Fed. 187;
Conrad v. United States, 127 Fed. 798;
United States v. Cunningham, 129 Fed. 833;
United States v. Stone, 135 Fed. 392;
United States v. Greene, 136 Fed. 618;
United States v. Mitchell, 141 Fed. 666;
United States v. Greene, 146 Fed. 766;
Same case, 146 Fed. 888;
Same case, 146 Fed. 889-890;
United States v. Bradford, 148 Fed. 413 (D. C.);
United States v. Booth, 148 Fed. 112;
United States v. Richards, 149 Fed. 443;
United States v. Brace, 149 Fed. 875;
Bradford v. United States, 152 Fed. 617 (C. C. A.);
Stearns v. United States, 152 Fed. 900-906;
Stearns v. United States, 152 Fed. 906;
Armour Packing Co. v. United States, 153 Fed. 5;
Van Gesner v. United States, 153 Fed. 46;
United States v. Cole, 153 Fed. 801;
Greene v. United States, 154 Fed. 401;
Ware v. United States, 154 Fed. 577.

In Stearns v. United States, decided February 1, 1907,
152 Fed. Rep. 900,
the doctrine contended for in these appeals by the government is advanced and sustained, viz: that a conspiracy to defraud the United States of the possession of public lands by means of fraudulent entries is within Section 5440, although there is no purpose or plan to carry the preliminary entries to final entry and patent, that is, it did not include the acquisition of title.

Stearns v. United States, 152 Fed. Rep. 906.

In the course of this opinion the Court said:

"To secure the entry by feigning to earn the title by faithfully and honestly complying with the law is to secure it fraudulently and to then use it as a mere cover for obtaining or prolonging the unlawful possession is to defraud the United States of the possession."

As to this aspect of the case we may employ the language of Judge Parlange in the Bradford case, affirmed by the Circuit Court of Appeals of the Fifth Circuit in 152 Fed., p. 617:

"(B) DEFRAUDING THE UNITED STATES.

"It is beyond question in my opinion, that to constitute "a conspiracy to defraud the United States under Rev. "St., Sec. 5440, it is entirely unnecessary to either allege "or prove a purpose to defraud the United States of a "thing of pecuniary value. The confusion as to the con- "tention made that to constitute a conspiracy to defraud, "under Rev. St., Sec. 5440, there must be a purpose of de- "frauding the United States of pecuniary value, arises "from the failure to distinguish between the purpose of

"statutes intended to punish cheats and frauds by private "persons committed against other private persons, and "the purpose of Rev. St., Sec. 5440, which is intended to "punish frauds against the sovereign. So far as my "knowledge goes, all the statutes of the former class, both "in this country and in England, provide, either in express "terms or by clear intendment, that the cheating or de- "frauding must be a thing of value. Such is the entire "extent to which those statutes go, and, of course, in prose- "cutions under them, it is essential to allege and prove "that the purpose of the defendants was to defraud others "of things of value. But no such restriction is found in "Rev St., Sec 5440, either in terms or by intendment. It "uses the broadest possible language. It punishes all who "conspire to defraud the United States 'in any manner and "for any purpose.' It is certainly just as important that "the government should not be defrauded with regard to "its operations, even if no pecuniary value is involved, as "that it should be defrauded of its property. In fact, I "believe that it is far more important that the government "should be protected against the former class of frauds, "and it would be astonishing, indeed, if Congress had failed "to afford protection against such frauds.

"The matter is so fully and ably discussed in the unani- "mous decision of the Circuit Court of Appeals for the "First Circuit in the case of Curley v. United States, 130 "Fed. 1, 64 C. C. A. 369 (a conspiracy to defraud in a civil "service examination), that I deem it unnecessary to at- "tempt to deal further with the matter. Specially notice

"McGregor v. United States (Fourth Circuit), 134 Fed., "at page 195, 69 C. C. A. 477, and cases there cited.

"Although I have stated herein my opinion that the "United States may be defrauded even when no pecuniary "value is involved, it should be specially noted that, under "the facts of this cause, the Court did not go into that "question with the jury. It should also be noted that the "Court granted without modification special instruction "No. 11 concerning conspiracy, etc., requested on behalf "of defendant Bradford, but applying by its language to "both defendants.

"While the following matters of law may have but little "bearing on this cause, as an effectual and successful con- "spiracy was shown, they may still have some value in the "general consideration of the cause. In prosecutions under "Rev. St., Sec. 5440, it need not be averred or shown that "the conspiracy was successful. Gantt v. United States "(Fifth Circuit), 108 Fed. 61, 47 C. C. A. 210. It is not "necessary to show that the conspirators received pecu- "niary advantage from the conspiracy. United States v. "Newton (D. C.), 52 Fed. 275; United States v. Allen, "Fed. Cas. No. 14,432."

U. S. v. Bradford, 148 Fed. 417.

In accord with these same considerations we find the Circuit Court of Appeals for the Eighth Circuit in *Ware v. United States,* 154 Fed. 577, where Circuit Judge Sanborn, speaking for the Court on page 584, states:

"But the purpose of the homestead laws is to induce set- "tlement, cultivation, and the establishment of homes upon "the public lands. The law requires the homesteader to

"reside upon his land at least one year before he may take "his proof of title. It requires him to make an affidavit "before he enters the land that he applies to enter it 'for " 'his exclusive use and benefit and that his entry is made " 'for the purpose of actual settlement and cultivation, not " 'either directly or indirectly for the use or benefit of any " 'other person.' Rev. St. §2290. It is true that a home- "steader may lawfully cut and remove such timber from "the public lands he enters as is necessary for him to re- "move and enable him to reside upon, improve, and culti- "vate the land before his final proof. But the cutting of "the timber or any other use of the land or of its products "by him prior to his final proof must be incident to his "actual cultivation, improvement, and living upon the land "in good faith, to procure his homestead for his own bene- "fit. Grubbs v. U. S., 105 Fed. 314, 320, 321, 44 C. C. A. "513, 519, 520; Conway v. U. S., 95 Fed. 615, 619, 37 C. "C. A. 200, 204.

"The use of the land entered by a homesteader, together "with adjacent lands by another person for grazing pur- "poses, until the entryman makes his final proof or dis- "poses of his holdings, without the reservation or applica- "tion of any part of the land or of its use to cultivation or "to residence thereon, is inconsistent with the purpose and "spirit and violative of the provisions of the law, and an "agreement to procure homesteaders to make entries of "public lands in order that third persons may obtain such "use from them is an unlawful agreement. It is a con- "tract to induce homesteaders to make applications to "enter lands, not for their exclusive use and benefit, but "for the use and benefit of another in violation of the oaths

"they are required to take when they make their applica-
"tions to enter, and there was no error in the refusal of
"the Court below to instruct the jury that such a contract
"was not an unlawful conspiracy. If qualified homestead-
"ers could lawfully lease or grant the use of the lands they
"might enter to others, without restriction or reservation,
"until they should prove up or dispose of their holdings,
"third parties might appropriate to themselves by the use
"of successive homesteaders, who would dispose of their
"holdings before they made proof of title, large tracts of
"the public domain for indefinite periods, and might
"thereby retard or prevent the use or sale of these lands
"by the United States."

In *Stearns v. United States* attention is called to a very relevant and important distinction. The trial court there instructed the jury that if the charge was otherwise established it was within the statute even though the purpose was confined to defrauding the United States of the possession and did not include the acquisition of title.

Stearns v. United States, 152 Fed., page 906.

In this case the Court, speaking through Judge Van Devanter, says, 152 Fed., page 906, after referring to the facts in that particular case, which was a conspiracy to secure homestead entries to control land for grazing purposes, said:

"The purpose in this was, not to initiate and secure lawful homestead entries on behalf of bona fide applicants, but to enable those who had the lands unlawfully inclosed to continue in the exclusive use and occupancy of them, as against the United States and the public, during the five-

year period prescribed for earning title under the homestead law. Many acts, including those specified in the indictment, were done by one or both of the defendants to affect this purpose. Whether or not it was also the purpose that the preliminary entries should be carried to final entry and patent for the benefit of the defendants, or the ranchmen and stockgrowers in whose behalf they were acting, was the subject of conflicting evidence.

"The Court, in effect, instructed the jury that, if the charge was otherwise established, it was within the statute, even though the purpose was confined to defrauding the United States of the possession of the lands by means of fraudulent homestead entries, and did not include the acquisition of the title. This, it is urged, was error, because, first, the United States could not be defrauded of the possession by anything short of what would pass the title; second, its possession of public lands is theoretical only and not a thing of value; and, third, the indictment, in charging the conspiracy, uses the word 'entries' only in the sense of final entries. We cannot assent to these contentions.

"The homestead law plainly confers the right of possession upon the entrymen when the preliminary entry is made, for it makes actual settlement, followed by residence and cultivation for a period of five years, a condition to obtaining the title, and requires the applicant to make and file, with the application for the entry, an affidavit 'that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for.' Rev. St., Sec. 2290; Act March 3, 1891, c. 561,

Sec. 5, 26 Stat. 1905 (U. S. Comp. St. 1901, p. 1389); Rev. St., Sec. 2291 (U. S. Comp. St. 1901, p. 1390); Shiver v. United States, 159 U. S. 491, 497, 16 Sup. Ct. 54, 40 El. Ed. 231; Peyton v. Desmond, 63 C. C. A. 651, 662, 129 Fed. 1, 12. But the right to the possession, like the right to make the entry, is extended only to those who intend to earn the title by faithfully and honestly complying with the law. To secure the entry by feigning such an intention is to secure it fraudulently, and to then use it as a mere cover for obtaining or prolonging an unlawful possession is to defraud the United States out of the possession."

THE STATUTE OF LIMITATIONS.

The foregoing authorities we believe amply demonstrate the indictment sufficient so far as showing a charge to defraud the United States in any manner and for any purpose.

Under the demurrer, though it was general, the matter of the statute of limitations was doubtless presented. By certain rulings on the admission of evidence the question is again presented in several different ways, but considering all of the assignments of error, they present the conclusion whether or not a conspiracy formed any time prior to three years next preceding the finding of the indictment can be prosecuted by an indictment found September 2, 1905, where overt acts were performed within the three-year period. We will now address ouaselves to this phase of the case.

We answer in the words of Judge Parlange:

"The statute of limitations. At common law, the con-
"spiracy alone constitutes the offense, without any overt
"act, and the conspirators can be prosecuted from the in-
"stant the conspiracy is formed. But under Rev. St., Sec.
"5440, no conspiracy can be prosecuted until an overt act
"is committed. I am fully aware of the statements found
"in the decisions to the effect that under Rev. St., Sec.
"5440, the gist of the offense is the conspiracy, and that
"the overt act is no part of the offense. Mr. Justice Woods
"so stated in United States v. Britton, 108 U. S., at page
"534, 27 El. Ed. 698. It may be interesting to notice, in
"passing, that it seems the same learned jurist had pre-
"viously held the reverse in United States v. Dennee, 3
"Woods, at page 50, Fed. Cas. No. 14,948. But those state-
"ments have never been made with regard to or affecting
"the question of the statute of limitations here presented.
"I agree fully that the overt act is not an element of the
"offense in the sense in which, in criminal law, a specific
"criminal intent, for instance, is an ingredient of an of-
"fense. Such ingredients are, as I believe, always culp-
"able, *per se*; whereas the overt act may be *per se*, and,
"considered independently of the conspiracy, a perfectly
"innocent act. But the indisputable fact remains that an
"offense under Rev. St., Sec. 5440, cannot be prosecuted
"until an overt act is committed. A criminal offense
"against the sovereign, which he cannot prosecute and
"punish, is, it seems to me, a matter which the legal mind
"cannot grasp. It is plain, then, that the statute of limi-
"tations is not set in motion by the forming of the con-
"spiracy, but that the moment the conspiracy is formed,

"and an overt act is committed by one of the conspirators "to effect the purpose of the conspiracy, that moment the "offense can be prosecuted, and the statute of limitations "begins to run as regards that conspiracy and that par- "ticular overt act. But I am absolutely unable to agree "that if, after committing the first overt act, the con- "spirators do nothing more for three years, and they are "not prosecuted within that time, they can thereafter con- "tinue the conspiracy, or renew it either publicly or se- "cretly and as often as they please, and that they can com- "mit as many acts as they choose to effect the object of the "conspiracy, and yet have absolute immunity from prose- "cution for the conspiracy. It is well settled, as I have "already said, that the overt act need not itself be an of- "fense. It might therefore be absolutely noncriminal *per* "*se*, and, being such, it could not attract the attention or "arouse the suspicion of the government. That immunity "from prosecution for the conspiracy would result from the "lapse of three years after the commission of the first "overt act, although the conspiracy were thereafter con- "tinued or repeatedly renewed, and many other overt acts "committed under it, is, to my mind, an utterly irrational "conclusion, which the law could never have contem- "plated.

"It was said during the trial that my view would lead "to the conclusion that for the same offense persons might "be subjected to many prosecutions. But this is entirely "incorrect. While the conspiracy *per se* might be the "same, yet if the conspirators chose to renew it, or to con- "tinue it in existence, and to commit new overt acts to "carry it out, the conditions under which the right of the

"government to prosecute would arise, would be different "every time a new overt act was committed. If, under "such circumstances, the conspirators are subjected, so far "as the statute of limitations is concerned, to a prosecu- "tion every time they commit an overt act, that result is "not brought about by any act of the prosecution in split- "ting up a continuous offense, as was attempted to be done "In re Snow, 120 U. S. 281, 7 Sup. Ct. 556, 30 El. Ed. 658, "a prosecution for unlawful cohabitation with several "wives, or by tolling the statute of limitations; but the re- "sult flows directly and conclusively from the acts of the "conspirators themselves. It might be said of their com- "plaint, as was said by the Supreme Court of Vermont, "quoted by the Supreme Court of the United States in "O'Neill v. Vermont, 144 U. S., at page 331, 12 Sup. Ct., "at page 696, 36 L. Ed. 450 (a prosecution for unlawful "selling of liquor, in which the defendant was convicted of "307 offenses, and sentenced, in the aggregate, to a fine of "$6,638.72 and to imprisonment for more than 55 years), "that the result is brought about, not by the law, nor by "any interpretation of it, nor by any act of the prosecu- "tion, but solely by the fact that the complaining defend- "ants committed too great a number of offenses. Obvi- ously, if the defendants had been charged with numerous "different conspiracies, completed, as regards the ability of the government to prosecute, by the commission "of many different overt acts, they would not be "heard to complain of a situation brought about "entirely by their own criminal acts, and which "subjected them to many prosecutions. What dif- "ference, so far as regards the statute of limita-

"tions, is there in principle between the condition just "stated and the proposition that there may be as many "prosecutions as there are overt acts, when the same con- "spiracy is renewed as each different overt act is commit- "ted? The conspiracy C, plus overt act A, create a crim- "inal condition for which the government can prosecute "under the terms of Rev. St., Sec. 5440, during three years "from the date of overt act A. The same conspiracy C, or "any other conspiracy, plus overt act B, create another "and a different criminal condition, for which the govern- "ment can prosecute during three years from the date of "overt act B. And so on. No court has ever held that "under Rev. St., Sec. 5440, the statute of limitations be- "gins to run from the original formation of the conspiracy, "and before the commission of any overt act. As I have "said before, it is inconceivable to me that the statute of "limitations should begin to run before the government "could prosecute. The difference of opinion is: (1) "Whether the statute of limitations begins to run from the "commission of the first overt act, regardless of any subse- "quent overt acts? Or (2) whether a prosecution begun "within three years of any overt act, committed to effect "the purpose of a conspiracy then in existence and in full "operation, is maintainable. The first view has been up- "held by Judge Deady, The Dorris Eckhoff (D. C.), 32 "Fed. 556, and Judge Bunn, Northwestern Mut. Life Ins. "Co. v. Cotton Exchange Real Estate Co. (C. D.), 70 Fed. "159, for whose opinions I have the greatest respect, but "with whom I am entirely unable to agree. The extraor- "dinary result of such a doctrine I have already referred "to. The second view, which in my opinion is the correct

"one, has been ably set out by the Supreme Court of Missis-
"sippi in American Fire Ins. Co. v. State (May 24, 1897),
"22 South. 99; by the Supreme Court of Pennsylvania in
"Com. v. Bartilson, 85 Pa. 487; by the Supreme Court of
"Illinois in Ochs v. People, 124 Ill. 429, 16 N. E. 662; by
"Judge Speer in United States v. Greene et al. (D. C.),
"115 Fed. 343; by the Supreme Court of New York in
"People v. Mather, 21 Am. Dec. 122-147, 4 Wend. (N. Y.)
"259, and by other authorities.

"It is well and fully settled that the commission of an
"overt act is, *per se,* a renewal of the conspiracy. Bish-
"op's New. Cr. Proc. Vol. 2, Sec. 206, and Vol. 1, Sec. 61;
"A. & E. Enc. Law (2d Ed.) Vol 6, verbo "Conspiracy,"
"p. 844, text and notes; American Fire Ins. Co. v. State
"(Sup. Ct. Miss., May 24, 1897,) 22 South., at pages 102
"and 103; Com. v. Bartilson, 85 Pa. 487-488; People v.
"Mather, *supra,* and other cases. However, I did not so
"charge the jury, although I would have been entirely
"justified in so doing. I charged, favorably to the defend-
"ants, that the jury had to find that the conspiracy existed
"and was in operation within three years, and that then
"they had further to find an overt act to effect the object of
"the conspiracy had also been committed within the three
"years.

"It is settled that the jury need not have found that the
"inception of the conspiracy took place within the three
"years. They had the right to go back to its origin for the
"purpose of determining whether it was continued or
"renewed and existed and was in operation within the
"three years. American Fire Ins. Co. v. State, *supra;* Mc-
"Kee v. State, 111 Ind., at page 382, 12 N. E., at page 512;

"Judge Speer in United States v. Greene et al. (D. C.) 115 "Fed. 343, and other cases. The doctrine as to the point "under consideration, which, in my judgment, is the cor- "rect one, is set out fully in the text of Am. & Eng. Enc. of "Law (2d Ed.) verbis 'Limitation of Actions,' Vol. 18, at "page 165. In foot notes on that page, it is made to appear "that the doctrine of the text is not in accordance with the "decision of Judge Bunn (United States v. McCord et al. "(D. C.) 72 Fed. 158), and the decision of Judge Deady "(United States v. Owen et al. (D. C.) 32 Fed. 534), "already referred to by me. Those two cases are the only "ones cited in opposition to the text on the question of "limitation. It should be noticed that while in one of the "same notes, the case of Dealy v. United States, 152 U. S. "538, 14 Sup. Ct. 680, 38 L. Ed. 545, is cited, that citation "is evidently meant to show that under Rev. St., Sec. 5440, "an overt act is required, and that the same is not part of "the offense. Dealy v. United States does not refer in any "way to the question of limitation involved in this cause."

Bradford v. United States, 148 Fed. 417 to 419.

In that case upon appeal the Circuit Court of Appeals for the Fifth Circuit adopted the foregoing decision of Judge Parlange as the law of the case.

Bradford v. United States, 152 Fed. Rep. 616.

In Commonwealth v. Bartilson, 85 Pa. St. 482, quoting Archbold's Criminal Pleading and Practice, 1056, the Pennsylvania Court says, "But if the overt act charged in the indictment or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the

parties thereto *first formed* the unlawful combination in their minds or gave effect to it by concerted action. If it has been renewed from time to time and overt acts committed through a series of years and one of said acts has taken place within two years, each renewal constitutes a fresh conspiracy for which an indictment will lie."

In the case of

Ochs v. People, 124 Ill. 399.

the Court considers an instruction which covers the very point of the opinion of the Court below. That *instruction* as given at page 429 in the opinion of the Illinois Court, was as follows:

"The crime of conspiracy was complete and the offense was committed when the crime or confederation was entered into and that the period of limitation would commence to run from the time of committing the offense."

The Supreme Court of Illinois says of *this instruction*:

"The instruction was calculated to lead the jury *erroneously* to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy instead of from the time of the commission of the *last overt act* in furtherance of the object of the conspiracy."

People v. Willis, 52 N. Y. 808, to face page 812,

the Court says:

"The conspiracy is an instantaneous crime, finished and complete at the alleged date of the concoction but a continuous one is one existing within the two years in active operation, as by overt acts."

In

Fire Insurance Cos. v. Mississippi, 75 Miss 24,

the Court says on pages 35 and 36:

"The well settled doctrine is that every overt act is a renewal of the original conspiracy then and there—a repeating of the conspiracy as a new offense."

In the case of

Lorenz v. United States, 24 Appeal Cases, D. C. 337, 386, 388,

the Court of Appeals of the District of Columbia, speaking to the question of the statute of limitations as applicable to the crime of conspiracy, said:

"12. The bar of the statute of limitations was raised by the defendants in two special instructions which the Court refused to give to the jury. These are as follows:

(Instructions omitted).

"The dates of the conspiracy, and of the several acts in furtherance of its object, as charged in the indictment, are given as within three years next before that instrument was presented by the grand jury.

"The contention on behalf of the appellants is that, if the conspiracy was in fact formed, and a single act in aid of its object committed, more than three years before the finding of the indictment, then the offense was barred by the statute of limitations; and that no other like act or acts, committed within three years, would amount to a renewal or continuance of the conspiracy so as to remove the bar.

"We cannot agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in Sec. 5440, Rev. Stat. (U. S. Comp. Stat., 1901, p. 3676),

though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be commited with impunity. *Through the repetition of such acts*—overt acts, as they are commonly called—*the conspiracy is made a continuing offense.* By each subsequent act it is repeated and entered into anew. *People v. Mather,* 4 Wend. 258, 21 Am. Dec. 122; *Com. v. Bartilson,* 85 Pa. 482; *Fire Ins. Cos. v. State,* 75 Miss. 24, 35, 22 So. 99; *Ochs v. People,* 25 Ill. App. 379, 414, 124 Ill. 399, 426, 16 N. E. 662; *United States v. Greene,* 115 Fed. 343."

In the case of

People v. Mather, 21 Am. Dec. 122, 4 Wend. 229,

it is held that the law considers that *wherever the conspirators act THERE THEY RENEW OR CONTINUE THEIR AGREEMENT* and the agreement is *RENEWED OR CONTINUED* as to all *WHENEVER* any one of them does an act in furtherance of their common design.

Within the explanations hereinbefore given of the term *"to defraud the United States in any manner for any purpose" United States v. Curley* and *McGregor v. United States* show it is conclusively evident that, in respect of the indictment at bar it need not appear therefrom that the United States would be defrauded, or that its land had been disposed of, or at least had passed so far as to become the property of an innocent purchaser, whereby the United States would be prevented from the recovery of the same.

All acts done (whether existing as a part of the first acts done or as an independent later act of a disconnected

variety from the acts previously done, but to further the object and extent of the purposes alleged in the indictment), are clearly acts within the purview of the definition given by the Curley case and the McGregor case, because under any or either of them the object and purpose was to effect the deception of, or practice an artifice upon, the United States in pursuance of the plan to defraud the United States.

United States v. Donau, 21 Blatchf. 168; 25 Fed. Cases 890.

After the joint design is fairly once established *EVERY OVERT ACT* done in pursuance of the original purpose, *whether by any of the conspirators or their agents* **is a renewal of the original conspiracy.**

McKee v. State, 111 Indiana, p. 378;

Tyner v. United States, Vol. 32 Wash. Law Rep. 258;

Palmer v. Colladay, 18 App. D. C. 426-433.

In

United States v. Greene, 115 Fed., top of page 350, Judge Speer, of the District Court of the United States for the Eastern District of Georgia, in February, 1902, held as follows:

"If it be true, as charged in this indictment, that this "scheme was formed as early as 1891 and its details were "from time to time put in operation and, finally, in 1897, "that it was made to apply to the particular works of the "Government then in progress, with a view to obtaining "fraudulently a share of the sums appropriated for the "public welfare, not only would there be no duplicity in

"the narration of successive steps, **but the final act, "even though the Statute of Limitations had in- "tervened as to other incidents, would remove the "bar and bring the entire scheme and all of its "details under the scrutiny of the Court,** in order "to determine from all the facts whether the parties were "guilty of a conspiracy which it is charged was renewed or "was completed at a date when the penal authority of the "law was in full force and effect."

The litigation in this case of United States v. Greene has become famous, and by reference to subsequent proceedings in it we find very many important points again before the consideration of the Court at a date some four years thereafter.

United States v. Greene, 146 Fed. 766;

United States v. Greene, 146 Fed. 766 to page 900.

Had the learned judge an inclination to change his opinion he certainly had the opportunity to do so from the examination of the various questions which were presented in this case and the length of time it has taken to try it, but Judge Speer has consistently held to his ruling on the question of statute of limitation.

United States v. Greene, 146 Fed. 803.

Furthermore, to make it entirely clear that Judge Speer has held consistently to the rule that prosecution cannot be determined at the date of the commission of the first overt act, but that the statute of limitations does not apply until three years have run from the commission of the last overt act, the Court is referred to the same case,

United States v. Greene, 146 Fed. 888-889.

On the last cited page the Court says:

"If the jury believe that these overt acts were committed "in pursuance of the conspiracy under which they are "charged, and that these acts were done through the co-"operation of these defendants, it would amount in law to "a renewal of the conspiracy at the date of the conclusion "of the overt acts charged and the statute of limitations "would not commence to run until the last overt act "charged under such conspiracy be counted and proven."

And Judge Speer was upheld in all of his views,

United States v. Greene, 154 Fed. 411.

Further, Judge Speer says:

"This is a well established rule. It has been held:

" 'But as each new overt act in furtherance of a common 'purpose becomes in law a new conspiracy, the time of the 'conspiracy may be laid within the period of the statute of 'limitations if the overt act was within that period; the 'prior combination, if established, and the later overt act 'being evidence from which a jury might infer conspiracy.'

"Such is the language of the Supreme Court of the United States."

Since the rendition of the opinion in the Greene case we are not without further and ample authority from respectable courts upon the same question in different districts, the principles of the cases being in thorough accord, but in absolute contravention of the doctrine announced by Judge Bunn.

United States v. Bradford, 148 Fed., page 417, page 418, page 419.

Both cases relied on below, viz:

United States v. McCord, 72 Fed. 159, and the decision of Judge Deady in

United States v. Owen, 32 Fed. 534,

being referred to, criticised, distinguished and applied in the Bradford case; and it was affirmed.

Bradford v. United States (C. C. A.) 152 Fed., p 617.

Furthermore, in the course of the opinion in the Bradford case it is dwelt upon that Justice Woods himself had *previously,* to the case of

United States v. Britton, 108 U. S. 204,

relied upon and cited in the case at bar, had himself expressed a converse opinion in the case of

United States v. Dennee, 3 Woods, p. 50

Fed. Cases 14,948.

Thereupon, the Judge states in the course of his opinion:

"But I am absolutely unable to agree that if, after com-
"mitting the first overt act, the conspirators do nothing
"more for three years, and they are not prosecuted within
"that time, they can thereafter continue the conspiracy, or
"renew it either publicly or secretly and as often as they
"please, and that they can commit as many acts as they
"choose to effect the object of the conspiracy, and yet have
"absolute immunity from prosecution for the conspiracy.
"It is well settled, as I have already said, that the overt act
"need not itself be an offense. It might therefore be abso-
"lutely non-criminal *per se,* and, being such, it could not
"attract the attention or arouse the suspicion of the Gov-
"ernment. That immunity from prosecution for the con-

"spiracy would result from the lapse of three years after "the commission of the first overt act, although the con- "spiracy were thereafter continued or repeatedly renewed, "and many other overt acts committed under it, is, to my "mind, an utterly irrational conclusion, which the law "could never have contemplated."

This doctrine is not only sound, but has the support of other authority and has been affirmed by the Apellate Courts.

United States v. Richards, 149 Fed. 443;
United States v. Brace, 149 Fed. 875;
United States v. Burkett, 150 Fed. 208;
Greene v. United States, 154 Fed. 411;
Ware v. United States, 154 Fed. 577.

After considering many of the foregoing authorities, the Circuit Court of Appeals for the Eighth Circuit, in the case of *Ware v. United States,* on July 10, 1907, 154 Fed. 578, speaking through Circuit Judge Sanborn, said:

"On the other hand, the offense denounced by Section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if, by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, *the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.*"

After a plea of not guilty a general verdict of conviction establishes the fact that the act charged in the indictment was committed within the time fixed by the statute of limitations.

United States v. Francis, 144 Fed. 521;
United States v. White, Fed. Cases No. 16,676.

The doctrine is that the Government cannot be entrapped nor compelled to make allegations of an impracticable standard of particularity and so averments which convey general understanding of the crime charged are sufficient. It certainly cannot be incumbent upon the Government to allege facts in an indictment with any greater particularity than accrues from the acts of the parties themselves; **that is, no greater particularity can be required than were described or identified by the parties themselves at the time they entered into their alleged unlawful agreement.** Hence it is not an implication but a positive certainty that in the inception of the conspiracy and during its progress it might not have been known who the persons would be that the conspirators would ultimately engage to their purpose. If this were not so it would be necessary for the Court to hold that the conspiracy would be lawful, although it was to defraud the United States, unless the parties specifically agreed upon the identity of the persons whom they were to persuade and likewise specifically agreed upon the identity of the lands which they were to take, and likewise specifically agreed upon the character of persuasion and inducement to be offered.

The points urged by appellees are more refined than sound.

United States v. Stevens, 44 Fed. Rep., 141;
United States v. Wilson, 60 Fed. Rep., 891;
United States v. Eddy, 134 Fed. 114.

In this latter case Judge Hunt said, **"The steady tendency of the Courts of the United States undoubtedly is to disregard forms even though they be mistaken in expressing the substance of crimes and indictments if the meaning can be understood."**

United States v. Rhodes, 30 Federal 431.

Justice Brewer said in the case of United States v. Clark, 37 Federal 107, "I am fully aware that there are authorities which do not concur with this view, and yet I think those authorities adhere too closely to the rigor and technicality of the old common law practice, which even in criminal matters is yielding to the more enlightened jurisprudence of the present—a jurisprudence which looks more at the matter of substance and less at the matter of form."

Justice Brewer again, after he went upon the Supreme Bench in the case of Dunbar v. United States, 156 U. S., page 193, speaking for the Court, said, "The language of the indictment quoted excludes the idea of any unintentional and ignorant bringing into the country of prepared opium, upon which the duty had not been paid and is satisfied only by proof that such bringing in was done intentionally, knowingly and with intent to defraud the revenues of the United States."

In the case of Wright v. United States, 108 Federal, page 810, the Circuit Court of Appeals for the Fifth Circuit says, "That omission of words would add nothing to the meaning of an indictment seems so clearly a defect of form only as to be apparent." No one reading the indictment could come to any other conclusion in regard to its meaning, and when this is the case the indictment is good enough.

In the case of Rosen v. United States, 161 U. S., page 33, Justice Harlan of the Supreme Court says, "He must have understood from the words of the indictment that the Government imputed to him the knowledge or notice of the contents of the paper so deposited."

It is not the true test of any indictment that it might possibly have been made more certain or more specific or definite.

Peters v. United States, 94 Federal 127.

One of the most important rules which counsel for appellees overlook is enunciated in United States v. Greene, 146 Federal, page 766, as follows:

"For the purposes of determining a question like this the indictment must be construed not by one generic descriptions alone, but after full consideration of all its clear and substantial averments."

The Circuit Court of Appeals for the Sixth Circuit in the case of Davis v. United States, speaking through Circuit Judge Severens, in considering a conspiracy case charging the conspirators with the commission of an offense in violation of Statutes Sections 5508 and 5509, Revised, said: **"If the evidence shows a detail of**

facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referrable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt."

In a recent case in the Ninth Circuit and from the very jurisdiction in which the indictment under question in this case took its source, the Circuit Court of Appeals on the 11th day of March, 1807, delivered an opinion, through Circuit Judge Ross, *Van Gesner v. United States,* 153 Federal, page 46 to face page 54:

"It is not the name but the essence of the thing that should control the Court in the administration of justice. As has already been said, the gist of the offense charged against the plaintiffs in error was the conspiracy, the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the Government title to the desired lands. 'In stating the object of the conspiracy,' said the Court, in United States v. Stevens (D. C.) 44 Fed. 141, 'the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they make a defense.' See also

Noah v. United States, 128 Fed. 272, 62 C. C. A., 618; United States v. Eddy (C. C.) 134 Fed. 114; U. S. v. Rhodes (C. C.) 30 Fed. 431.

"We are of the opinion that the indictment is sufficient, and that the Court below did not err in permitting proof of the false swearing of the instigated parties, both in respect to their declaration in the verified written statement of application to purchase, and in the final proof made by deposition."

THE ADMISSION OF EVIDENCE AND RULINGS THEREON AND INSTRUCTIONS OF THE COURT

Counsel for plaintiffs in error seem to attach much importance to the introduction in evidence of the affidavit of witness Wells, made before Neuhausen, which is Government's Exhibit 25 (Transcript of Record, page 902.)

In relation to this step in the trial it must first be observed that counsel admit that the purpose of their cross-examination of this witness before the introduction of the affidavit *was for the purpose of showing that the extracts* from the affidavit concerning which Wells was so interrogated by counsel (Transcript, pages 900-901) prior to its introduction in evidence, *were contradictory to the previous testimony of the witness.* (Transcript of Record, pages 850-856.) In a word, that the witness had made contradictory statements concerning these matters.

All the testimony of the witness Wells is not in the Record. It is proper to conclude that much of the cross-examination of plaintiffs was, therefore, either as they

now admit, to contradict and challenge the credibility of the witness or by *preliminary interrogation* lay ground for the benefit of discovery of some further facts more favorable to the defense from the oral examination of this witness respecting the correctness of his written statement as compared with his testimony given subsequent thereto upon the trial.

Neither the section of Wigmore, the O'Brien case nor the Artery case cited by plaintiffs in error apply to this situation. But if we concede, for illustration, they do, then the answer is this:

Counsel interrogated the witness themselves admittedly to their purposes of the case.

Wigmore on Evidence, Vol. II, Section 1385, subdivision (3), says of this:

"The interrogation of an *opponent* by way of discovery is in itself in the nature of a cross-examination and secures all the benefits of it."

That is, secures all the benefits of cross-examination. So the affidavit then is not *ex parte.*

Furthermore, this affidavit was a *"previous evidenciary statement of the witness,"* and when interrogated concerning it by plaintiffs in error the witness affirmed it as correct. (Transcript of Record, page 901).

It therefore became a record, under the eye and ear of counsel and in presence of defendants, verified and adopted by the witness. It thus became a part of the testimony of the witness. It was offered as a statement of the whole conversation between witness and the officer. (Transcript of Record, top page 902.)

Counsel then objected generally (Record, page 902),

not on the ground of prejudicing defendants or depriving of right of cross-examination, or that it was hearsay or any other specific reason. The right of confrontation of the witness was not denied plaintiffs in error. *Wells was on the stand.* To experiment admittedly to contradict the witness or affect his credibility and then complain of the result at this late date as an afterthought on more specific grounds, does not well become the able counsel for plaintiffs in error.

Again, all the matters contained in this affidavit went to the jury by testimony out of the mouth of the witness while sitting on the stand and subject to cross-examination.

It cannot avail counsel to say that this was not so, because the record must affirmatively show error. It will not be presumed. All the testimony of the witness Wells not being in the record, it must be presumed that other testimony was given. The Record says, page 900: "Upon the re-assembling of the Court, and after *some testimony was given by the witness* he testified, etc." What was the *"some testimony"?*

The fact of mere inspection alone, as is now claimed, does not make for error alleged. The fact is they wanted to show contradictions and impair credibility of the witness; and, moreover, so stated to the Court and so led the Court to believe.

Now the principle which entirely justifies the presentation of this affidavit to the jury is found in Wigmore at Section 754, Vol. 1, page 847:

"If by verifying and adopting the record of *past recollection* the witness makes it usable testimonially, and if

by this verification alone can it become so usable, it follows that the record thus adopted becomes to that extent the embodiment of the witness' testimony. Thus (a) the *record verified and adopted becomes a present evidenciary statement of the witness;* (b) and as such it may be handed or shown to the jury by the party offering it."

And he concludes by saying, Section 754, top of page 849, that those cases which refuse to allow such verified and adopted record of past evidenciary statement to be "read in evidence" or "given in evidence" after its verification and adoption as a *"present* evidenciary statement" must be regarded as unsound in principle.

Curtis v. Bradley, 67 Conn. 99;
Same case, 31 Atlantic 591.

It seems to us counsel for plaintiffs in error beg the very meat of this question. They instance in their brief the supposition that if the District Attorney had affidavits of all the witnesses and defendants' counsel asked for them, to claim then the right to read the affidavits and keep the witness off the stand would deprive the defendants of their Constitutional right to meet the witnesses face to face.

But the fact is this witness Wells was on the stand and all defendants joined in the experimental examination of testing his credibility and of showing or attempting to show contradictions.

The situation is then this: Reading from the past record counsel asks did you state so and so, and is that correct, answered yes, and so forth (Transcript of Record, page 901), the witness being then on the stand. This is

admittedly to affect the credibility (Transcript of Record, page 902). How otherwise can that credibility so slurred at be measured correctly by the jury if they do not receive all the accompanying facts and circumstances in connection with the whole statement and the previous oral testimony given on the trial by the same witness.

So the Court below, under the objection then made properly, in view of the attitude of counsel and the then state of the case, acting within its plenary discretion in respect of which no abuse is shown or alleged, admitted the Wells affidavit.

Counsel further complain of "Govt. Ex. 26," Transcript of Record, page 911, then offered with the Wells affidavit and as part of the same. This was properly admitted. But if it can be said that it was not, the complaint now made does not avail, for "Govt. Ex. 212," Transcript 957, Jones' letter of April 23, 1904, has as a part thereof, the same agreement. See Transcript of Record, page 598 last four lines of the top paragraph on that page, and pages 604 to 608, Transcript of Record, where Jones' own sworn certificate identifies the instrument. Govt. Ex. 212 was competent and the agreement went in with it. So no prejudice could result.

The general principle upon which the government relied, without descending to particulars, is well illustrated in the case of *Ware v. United States,* where the Court said, 154 Fed. page 580:

"The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent

execution of its scheme which controlled the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the Court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons with the three years to the existence and execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the *res gestae,* may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. Drake v. Stewart, 22 C. C. A., 104, 107, 76 Fed. 140, 143."

Within our view of the case we might rest with this general principle and submit the case, but inasmuch as counsel for plaintiffs in error have seen fit to draw into their brief many criticisms which seem to us based upon state practice and in respect of which it is insisted that there can be no just application to a case in the Federal Court, we look further into the authorities for general

guidance upon the rules which govern a case of this character in the Federal Court. The *Ware* case above cited, it will be observed, is in the *Circuit Court of Appeals for the Eighth Circuit.*

In the *Circuit Court of Appeals for the Seventh Circuit,* that Court, speaking through Circuit Judge Grosscup, said, in *Lang v. United States,* 133 Fed. 204:

"Questions relating to the admissibility of evidence in criminal prosecutions, based on violations of the Statutes of the United States, are questions wholly within the general rules and law applicable to the conduct of trials, and not at all subject, except as state statutes or decisions may be persuasive, to the statutes of decisions prevailing in the particular state where the Court happens to sit; otherwise each state would have a substantial part in determining the manner in which the Courts of the United States should enforce not the law of the state, but the national laws."

The Circuit Court of Appeals for the First Circuit, considering a very important conspiracy case, *Grundberg v. United States,* 145 Fed. page 81, to face page 92, Circuit Judge Putnam speaking for the Court, says,

"The Court, referring to the point that the witness testified generally as to the correctness of the facts stated in the memorandum which he produced, observed that, if the evidence of the witness had not been satisfactory, his cross-examination should have been placed on the Record. In view of the instructions to the jury to which we have referred, and in view of the fact that Lehmann and Schlaepfer each testified positively that they knew certain

important matters as to which they testified, it seems impracticable for an Appellate Court, on such a statement as we have here, to sift out the record and reverse the judgments because of a possible difference of opinion between the Appellate Tribunal and the Trial Court as to how far the evidence should have been submitted to the jury for it to determine to what extent the testimony of the witnesses in question should be accepted in accordance with the instructions we have cited. As each of the witnesses plainly had knowledge of a part of a chain of events, and as the Court had clearly instructed the jury to accept their testimony only to the extent of that personal knowledge, whatever else they apparently testified might, unless the record was full, be taken from our consideration."

These conclusions were reached in that case where the objections were to the point that the witness could not have had knowledge concerning the facts that he testified about.

In *United States v. Newton*, 52 Fed. 275, in a case of conspiracy to defraud the United States by fraudulently increasing the weight of mail matter, the Court in that case said:

"It is not necessary, to justify a verdict of guilty, that the conspiracy should have been formed and in full existence prior to the weighing of such fraudulent mail matter. It is sufficient, if the defendant and any other person at any time during the weighing, formed a common design to defraud the Government in connection with such weighing, and that then the defendant or such other person committed an overt act in connection therewith."

The facts produced in evidence before the jury in this

case show beyond peradventure that the defendants knew by actual participancy of the things done and the purpose for which they were done.

United States v. Bradford, 148 Fed. page 413, at face pages 424 and 425.

But what we deem more especially to support the sufficiency of this verdict incidentally arises, beyond any consideration of justifying the admission of evidence or the Court's instructions, *as a matter of procedure.* Taking the objections, and assignments of error based thereon, by their length and breadth, challenging the sufficiency of the indictment by questioning the evidence introduced under its allegations, all these objections raised in this way are to our mind waived by the action of the accused in subsequently proceeding to offer evidence in their own behalf as to the very matters thus previously objected to.

Burton v. United States, 73 C. C. A. 243; 142 Fed. 57;

School District v. Chapman, 152 Fed. 887;

Stearns v. United States, 152 Fed. 905.

As has been frequently pointed out, a conspiracy case necessarily depends for proof upon the circumstances surrounding it. The principle of law which has the sanction of all respectable Courts, is this: *If the circumstances surrounding the transaction under investigation are so intimately connected with each other and the principal facts at issue that it would result in depriving the jury of consideration of the accompanying circumstances if shut out, it is proper to admit them.* This doctrine has the support of the *Circuit Court of Appeals for the*

Fourth Circuit in the case of *Sprinkle v. United States,* 141 Fed. 811. The Court speaking through Judge Waddill, says, citing many authorities:

"In the present case, five persons are charged with the conduct of a business, lawful in itself, but which became unlawful because of the intent with which it is charged to have been carried on; and it is alleged in the indictment, that the purpose of the three companies within the State of North Carolina was the better to effect the unlawful object; and from the proof it appears that four companies in three different states of the Union were also used to effect such unlawful undertaking—that is, to defraud the United States—and that the said defendants jointly, as individuals, and in the names of the said companies, were knowingly engaged in defrauding, and did defraud, the Government of its revenue. This necessarily involved a variety of transactions, covering many times and places, long distances, one from the other, and during a period of some 12 months. But, so far as the crime is concerned, when once established, they all were and became a single transaction, and in that view clearly admissible. Ought not the acts, conduct, and doings of each of the defendants—not their statements, declarations, or admissions necessarily, but what they or either of them may have done—in and about any material transaction forming a necessary part of the business in hand, whereby the Government was defrauded of its revenue, manifestly be submitted to the jury, with a view of determining the *bona fides* of their acts; that is, their intent in the premises? They should, of course, be the necessary incident of the litigated act, and such acts, incidents, and doings as are

necessarily and unconsciously associated with the crime as committed. **The fact that the circumstances attending a particular transaction, when so interwoven with each other and with the principal fact that they cannot be separated without depriving the jury of what is essential, may be submitted to the jury, seems now well recognized and settled.**

St. Clair v. United States, 154 U. S. 149, 14 Sup. Ct. 1002, 38 L. Ed. 936; Beaver v. Taylor, 68 U. S. 637, 742, 17 L. Ed. 601; Insurance Co. v. Mosley, 75 U. S. 397, 407-8, 19 L. Ed. 437; Clune v. U. S., 159 U. S. 590, 592, 16 Sup. Ct. 125, 40 L. Ed. 269; Wieborg v. U. S., 163 U. S. 632, 657, 16 Sup. Ct. 1127, 41 L. Ed. 289."

In the citations which Judge Waddill made, however, it does not appear that his attention was called to the case of *Wood v. United States,* 16 Peters, pages 358 and 362, in which Justice Story, speaking for the Court, said:

"Passing from this, the next point presented for consideration is, whether there was an error in the admission of evidence of fraud, deducible from the other invoices offered in the case. We are of the opinion that there was none. The question was one of fraudulent intent or not; and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to

establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty.

"Indeed, it is admitted by the counsel for the plaintiff in error, in the case before us, that it is a general principle of law, that whenever a fraudulent intention is to be established, collateral facts tending to show such intention are admissible proof. But the objections taken are, first, that when the proof was offered, no suitable foundation had been laid for its admission, and that the cause was launched with this proof; and secondly, that the proof related to importations *after, as well as before, the particular importation in question. We do not think either of these objections maintainable.* (Italics ours). The fraud being to be made out in evidence, the order in which the proof should be brought to establish it, *was rather a matter in the discretion of the Court, than of strict right in the parties.* It is impossible to lay down any universal rule upon such a subject. Much must depend upon the posture and circumstances of the particular case; and at all events if the proof be pertinent and competent, the admission of it cannot be matter of error. The other objection has as little foundation; for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party, as fraud would be, in the last importation, from prior fraudulent importations. In each case, the *quo animo* is in question, and the presumption of fraudulent intention may equally arise and equally prevail."

These rules and principles apply as well to the testimony of third persons as they do to parties litigant.

Much is said in the brief of counsel for plaintiffs in error of the damage done to the defendant Jones by reason of the testimony concerning the forwarding of the letters of the entrymen from Roots. But what were the accompanying facts and circumstances? What did the Court have to consider on the trial of this case? Well; we find that the Transcript of Record, page 972, discloses that Warren E. Hall was sworn as a witness and said that he was the postmaster at Siletz during the year 1901. This testimony is given in another part of the case and at another time than that of the postmaster concerning the forwarding of the letters from Roots; and he states that he knew two of the entrymen and that he ran a store at Siletz, and he testified that there was an *order left by Mr. Blauvelt in September,* 1902, together with a list of the persons whose mail was to be forwarded to Portland in care of W. N. Jones, and he was then asked to name the persons and he named them, and it was disclosed that a great many of the persons that he named were the entrymen *whose proofs were already in the case.* It naturally followed that, if these entrymen, taken to the claims as the evidence already showed that they were, by Jones or by Potter, *left even so personal a thing as their mail in the control of Jones in order that he might pick up the notifications from the Land Office or the letters from the commissioner, or whatsoever it might have been,* **Mr. Jones was pretty well informed and certainly consciously participated in the case.** Just as Potter was participating in the case by having

the letters addressed to the several entrymen who had made a protest to the Land Office, in the care of Thaddeus S. Potter, Chamber of Commerce, Portland, Oregon. Under what possible aspect of the case but that above given could the jury consider the only part of this testimony which so comes into this case? Not under an objection that it is the testimony of someone not authorized to bind Jones. Not under the objection, as now made, that it is the testimony of a postmaster without showing that Jones did or did not authorize him to forward such mail. But under objections *then made* that the statute of limitations shut out these proofs. Yet the proofs were in. The commutation affidavits were in, and the letters addressed to and from the Commissioner of the General Land Office were in. The previous state of the record prior to the admission of this testimony justified the acceptance of it.

It was certainly, therefore, competent to show the accompanying facts and circumstances to this jury in order that they might know how Jones and Potter could be readily advised at all dates and times, to even anticipate, as it appears from some of the affidavits, the rulings of the Commissioner, that they might make the proper showing to the Land Office in behalf of their several entrymen.

We have nothing to do with the arrangement of the bill of exceptions prepared by the counsel for the plaintiff in error. He prepared his bill of exceptions at his peril. Undoubtedly he prepared it well. But what possible excuse can there be for the proposition asserted and stated in the brief of counsel for the plaintiffs in error in view of the foregoing, in the following language: "Is

evidence of the acts of a third party not connected with the defendants admissible for the purpose of raising a presumption against them?" Note the word "presumption"; as well say inference; as well say collateral and connected facts. That is what the Courts say. Justice Story says that whenever a fraudulent intention is to be established collateral facts tending to show such intention are admissible proof, and this was stated by Justice Story in a case where the objections were almost identical to the objections in this case, as follows:

1st. That there had been no suitable foundation laid for the proof, and

2nd. That the proof related to matters occurring *after the particular transaction charged in the indictment and* that defendants could *not be bound by the acts of a third person.*

But Justice Story continued to say:

"We do not think any of these objections maintainable. The fraud being to be made out in evidence, the order in which the proof should be brought to establish it, was rather a matter in the discretion of the Court, than of strict right in the parties."

But suppose that Postmaster Michek testified before Hall, and suppose that the entire order of proof was reversed, and suppose that he did not remember having any talk with Jones, as stated in the brief of plaintiffs in error. The fact is that Jones got the mail; the record exhibits show it in the transcript and the testimony of the witnesses proves it and Postmaster Hall says he did it. Did what? *Forwarded the mail on the order of Blauvelt of all these entrymen to Jones at Portland.*

Now let us see whether the acts of independent third persons, considering from that standpoint a conspiracy case after connection has been shown, can be introduced in evidence.

The Circuit Court of Appeals for the Ninth Circuit, speaking through Judge Hawley, then sitting with Judges Gilbert and Ross in the case of *Dolan v. United States,* 123 Fed., page 54, says that when the connection of the person against whom the evidence is offered with the conspiracy is affirmatively shown, that any statement tending to show a conspiracy or to prove a collateral fact in connection therewith from persons to whom it was made is admissible against such party whose connection had been shown with such conspiracy. It happened in the Dolan case, however, in which Judge Hawley enunciated this rule, that the connection of the person against whom the evidence was offered with the conspiracy had not been shown.

See also The San Rafael, 141 Fed. 279.

Counsel attempt to maintain that evidence of this character is but presumption based upon presumption.

But this Court in the *San Rafael,* opinion by Circuit Judge Ross, October 16, 1905, speaking for the Court in 141 Fed. 279, said:

"We are of the opinion that the Court below was right in its conclusion that Alexander Hall was a passenger on the steamer San Rafael, and met his death by reason of the collision between her and the steamer Sausalito. To do so is not, as contended by the proctor for the appellant, *basing presumption upon presumption,* but it is the

drawing of the proper and logical inference from all the facts and circumstances disclosed by the evidence in the case. (Italics ours.)

"The objections on the part of the appellant to the declarations of Hall in respect to his intention to go to San Rafael, are not well taken. 'Whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party. The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it.' Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. See, also, Ins. Co. v. Mosley, 8 Wall. 397, 19 L. Ed. 437; Shailer v. Bumstead, 99 Mass. 120."

In *Connecticut Mutual Life Insurance Company v. Hillmon,* the Supreme Court considering the matter of a fraudulent conspiracy to cheat the Life Insurance Company out of insurance, in 188 U. S., speaking through Mr. Justice Brown, at page 219 said:

"In a conversation with one Wiseman, in February, 1879, Hillmon stated that he was going West on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for $25,000, the annual premium for which amounted to $600. There were various other items of testimony of

the same character, which the Courts below regarded as sufficient *prima facie* evidence of a conspiracy.

"Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though *she was not alleged to be a party to the conspiracy,* upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her."

Note that this evidence was allowed *"though she was not alleged to be a party to the conspiracy."*

In *Van Gesner v. United States, the Circuit Court of Appeals for the Ninth Circuit,* in 153 Fed., page 47, speaking through Judge Ross, said:

"Under such indictment, it was also competent for the government to show, by the persons who made such applications to purchase lands, that it was their intention and understanding at the time that the lands should be conveyed by them to defendants, contrary to their sworn statements and testimony."

The lower Courts have universally enforced this rule. See for instance *United States v. Francis,* District Court Eastern District of Pennsylvania, 144 Fed., page 520; likewise *United States v. Greene,* District Court Southern District of Georgia, 146 Fed. 793.

In that case entries regularly made in the books of a business concern contemporaneously with the transactions recorded and supported by the testimony of the employee who made them, were deemed admissible as evi-

dence of the facts therein shown on the trial of a criminal prosecution against third persons.

In the *Circuit Court of Appeals for the Eighth Circuit,* in the case of *Kansas City Star Company v. Carlisle,* Judge Thayer, speaking for the Court in 108 Fed., page 360, refers to that feature of the case where there was offered in evidence the substance of a conversation between the man who had stolen the cattle and one Gordon, but not in the presence or hearing of Carlisle. Circuit Judge Thayer says:

"This evidence, if it had been admitted, would have had a tendency to show that Carlisle, as well as Gordon, knew that certain cattle in the herd had been stolen, and that Gordon reported to White, but not in the presence of Carlisle, that Carlisle had said he 'thought he would be able to dispose of them, all right.' It is obvious that this conversation between White and Gordon, not in the presence of Carlisle, was only admissible upon the theory that at the time it was offered there was already sufficient evidence before the jury to establish a conspiracy between Carlisle, Gordon, and others to steal cattle, which made the declarations of any conspirator admissible against his fellow conspirators."

In *St. Clair v. United States,* not a conspiracy case, but a murder case, the Supreme Court of the United States, in 154 U. S., page 35, says in the syllabus:

"On the trial under an indictment charging that A, B, and C, acting jointly, killed and murdered D, without charging that they were co-conspirators, evidence of the acts of B and C are admissible against A, if part of the *res gestae.*"

In *Clune v. United States,* Justice Brewer, in the Supreme Court of the United States, 154 U. S. 590, declares the acts of persons not parties to the record are, in conspiracy cases, admissible against the defendants, if they were done in carrying the conspiracy into effect or attempting to carry it into effect.

See also Lincoln v. Claflin, 7 Wall, page 132.

In discussing the foregoing alleged exceptions it was necessary in the citation of these authorities to refer to many which go to the doctrine that in conspiracy cases evidence of other acts to show system, knowledge, design, motive and intent are admissible, and without again citing those cases, the leading one of which is the opinion of Justice Story in 16 Peters, page 359, we refer, in conclusion, to two others:

In the *Circuit Court of Appeals for the Sixth Circuit,* in the case of *Davis v. United States,* that Court had for consideration a like question and enunciated what the government contends to be the true rule in cases of this character, 107 Fed., pages 753 and 756:

"If, in a prosecution for conspiracy under such statute, the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, it is sufficient if it satisfies the jury beyond a reasonable doubt."

And the Court further said, page 756:

"The fourth point made is that the district attorney was permitted, over the objection of the defendant, to in-

troduce proof of other offenses, entirely separate and distinct from that for which he was on trial. The first specification under this head is upon the overruling of an objection to a question of the district attorney put to a witness, McDuffy, who was living nearby the plaintiff in error at the time when the officers attempted his arrest and Garner was killed. The question was, 'Did you know anything about George Davis having a still there?' to which the objection was made that it related to another violation of law, entirely distinct and separate from that for which the respondent was being tried. The objection being overruled, the witness testified that Davis did have a still there; that it was at one time east of his house, 'and then he had it on the west side.' We think it was competent to show the fact called for by the question. It was admissible to prove the object and purpose of the alleged conspiracy, and explain the motive of the respondent in entering into it, and in resisting the officers by firing upon them and killing one of their number. The objection was properly overruled."

Finally, in *United States v. Burkett,* the case cited by counsel for plaintiffs in error, we find District Judge Pollock announcing the following principle, which has the support of all the authorities hereinbefore cited and of other courts, 154 Fed., page 208:

"In a prosecution for conspiracy, it is not necessary to charge all the overt acts done or necessary to be done to render the object of the conspiracy effective, or to charge that the unlawful conspiracy proceeded to a successful determination as designed; it being sufficient that

the conspiracy, unless interrupted, might have accomplished its unlawful purpose."

See also *Sprinkle v. United States,* 141 Fed., page 816, quotation from which is given at length above.

On this subject the counsel for plaintiffs in error complain of an instruction refused by the Court and of the one given by the Court on the theory that the Court left it to the jury to find the defendants guilty upon the commission of other crimes than those charged in the indictment. (See their briefs, page 79.)

With that charity which should prevail among members of the bar and without any desire to become facetious, nevertheless it is a painful duty to point out that either the printer has made a mistake and counsel has overlooked the proof of the printer, for a very serious and important error has crept into their quotation of that portion of the charge which was actually given by the Court. If the Transcript of Record is examined at page 1072 it will be observed that the Court stated as follows:

> "As I have had occasion to advise you during the course of the trial, however culpable you may believe the defendants or any of them may have been with reference to any point testified to *but not* included in this indictment, etc."

while counsel's quotation leaves out the significant words **"BUT NOT"** before the words "included in this indictment," which when inserted and read in connection with the other portions of the charge, leaves these collateral facts *impossible of consideration by the jury for any other purpose than that of showing guilty intent, purpose, design or knowledge.*

In *Loder v. Jayne,* District Judge Holland, 142 Fed., page 1015, in respect to like instructions, states the following principles:

"These instructions, upon a review, we are convinced were properly given, and that the findings of the jury were based upon competent evidence. Many acts and declarations of the various associations, their officers, committees, members, and agents made in the absence of many of the other defendants in the case for the purpose of proving the conspiracy, were admitted before a *prima facie* case of conspiracy had been established and before the privity of some of the defendants had been proven. It is true that the rule in the admission of evidence in conspiracy cases is to require first the proof of a *prima facie* case of conspiracy before the acts and declarations of co-conspirators made in the absence of defendants are admitted against them, although the Court may, in its discretion, permit evidence of the declarations to be introduced out of its order, upon condition that it be afterwards followed by evidence of the conspiracy, and in some peculiar instances, in which it would be difficult to establish defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. Elliott on Evidence, vol. 4, Sec. 2939; Id., vol. 1, Sec. 249; Rice on Evidence, vol. 3, p. 904, Sec.

578d. All the evidence sought to be stricken out by the motion of defendants, which raised the question of the competency of this evidence, was of this character and clearly admissible. On the whole evidence, the combination and the privity of defendants were established by proof of facts personal to each connecting him therewith."

In *United States v. Greene,* in the District Court, District Judge Speer says in the syllabus, 146 Fed. 784:

"On the trial of defendants, charged with conspiracy to defraud the United States, evidence is admissible to show the state of mind of one charged as a co-conspirator with respect to the matters to which the alleged conspiracy related, prior to the date when it is alleged to have been formed.

"A letterpress copy of a letter purporting to have been written by an alleged co-conspirator of defendants on trial, found in his possession and shown to be in his handwriting, is admissible as original evidence to show his state of mind at the time the letter was written, where that may be material evidence in proof of the conspiracy, *without showing that the original letter was sent to the person to whom it was addressed.*" (Italics ours.)

Again, in further consideration of the case of *United States v. Greene,* 146 Fed. 789, Judge Speer says, on page 792:

"The object of this evidence is to show such joint action and mutual support on the part of Carter (who ought always to have represented the government) and the contractors whose interests were to the contrary, as would indicate an improper understanding and improper rela-

tions between these parties. The District Attorney states in his place that he purposes to show by other evidence that this joint and mutual support ripened and fructified into the conspiracy with which the accused now stand charged. Whether he succeeds in doing this or not, if it be true, as appears from the face of these letters and telegrams that Carter felt at liberty not only to call upon Greene and Gaynor, or either of them, for affidavits and telegrams denying an injurious charge which Curtis made, but that the relations between Carter and Greene were so close that he felt at liberty to dictate the telegram and the affidavits he wished Greene to make, it may tend to show a degree of intimacy between the alleged co-conspirators which is always material in evidence on charges of conspiracy or criminal joint action. Of course, the letters and telegrams are admitted because of what appears on the face of the papers taken in connection with the statements of the supplemental proof to be offered by the District Attorney."

In *Peters v. United States,* a case from the *Circuit Court of Appeals for the Ninth Circuit,* District Judge Hawley, with whom were then sitting Judges Ross and Morrow, declared for the Court as follows, 94 Fed., page 130:

"The rights of a defendant in a criminal case should, at all times, be carefully guarded. But courts must look at the substance, instead of the mere shadow, of the alleged errors. Courts should not be called upon to deal with 'trifles light as air.' We have carefully read all the testimony contained in the record, and have arrived at the conclusion that the evidence is sufficient to sustain the verdict of the jury. This being true, there must be

something legal, tangible, and real affecting the essential rights of the defendant to justify the Court in reversing the verdict of the jury. Error in law must be affirmatively shown. If the plaintiff in error has not been deprived of any substantial right; if he has not been misled; if he has not been prejudiced or injured in any respect—he has no real or substantial cause for complaint simply because the old forms and precedents have not been literally followed."

Counsel assert on page 128 of their brief that the action of the government officers as shown by the evidence was not a legitimate ground from which any inferences could be drawn by the jury and they put the question whether the acts of government officials as shown by the papers introduced in evidence are properly adducible for the purpose of placing before the jury inferences connected with the case.

This matter has been settled by the Supreme Court of the United States. An analogous instance was with respect to the matter of mailing certain papers through the United States Post Office establishment in the case of *Dunlop v. United States.* The Supreme Court in that case, 165 U. S., speaking through Justice Brown, decided as follows, pages 494 and 495:

"The testimony of both of these witnesses was objected to upon the ground that they testified nothing as to the delivery of these papers of their own personal knowledge. It is claimed that the error consisted in assuming that the papers, purporting to be the Dispatch, which McAfee testified that he found in his private box in the inspector's office, were deposited in that box by the clerk or messen-

ger, and then in permitting McAfee to testify that it was the duty of the clerk or messenger to take the mail from the post office and distribute the same in certain private boxes in the inspector's office. A similar objection was made to the testimony of Montgomery.

"It is unnecessary to dwell upon these assignments at any length. While the witnesses were not personally cognizant of the fact that these very papers were placed in their private boxes, it was perfectly competent for them to prove the customs of the post office, the course of business therein and the duties of the employees connected with it. If it were the duty of this messenger to take these papers from the office and deliver them in the private boxes of these witnesses, and the papers identified were there found, it would be proper for the jury to infer that they had been delivered in the usual way, after having been mailed at the post office in the city of publication. Both of these witnesses were government officers and testified as to the course of business in the respective offices with which they were connected. There was no error in permitting them to do so."

See also the case of

Grunberg v. United States, 145 Fed., page 81.

Touching also this aspect of the case in another particular it is asserted by counsel in their brief that there was no authority shown in Hobbs to administer an oath (See their brief, page 113). This was a matter of judicial notice. The exhibit No. 263, Transcript of Record, page 675, itself contains evidence that Hobbs was a special agent and for aught that appears to the contrary many of the papers introduced in evidence were so signed by Hobbs.

The Court therefore would have in mind the provisions of the Revised Statutes which in this respect are as follows:

"Sec. 183. Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose, shall have authority to administer an oath to any witnesses attending to testify or depose in the course of such investigation."

This brief for the government was more than half written and in fact nearly completed prior to the receipt of the paged and printed brief of counsel for plaintiffs in error. Perforce of all these circumstances and other business intervening, the writer has been compelled to discuss, by way of answer as it were, the various rules and principles which meet the several objections which counsel for plaintiffs in error assert.

There being, however, one hundred and sixty-three assignments of error, it has been assumed that counsel for plaintiffs in error will abide by those only which are discussed in their brief. If there had been specifications of errors printed in the brief of the plaintiff in error a more orderly arrangement could have been adopted in the construction of this answer.

It remains to present to the Court the general considerations upon the whole charge.

It is the rule in the Federal Courts that where the matter of specific instructions requested is substantially con-

tained in the whole charge, or that the charge, taken together as an entirety, substantially covers the several matters requested and the theory of the case submitted, the Trial Court is not under any obligations to charge in the particular language offered or to charge in accordance with the language of any particular Court.

Coffin v. United States, 162 U. S. 664, 672;
Dimmick v. United States, 135 Fed. 259;
Northern Pacific Railroad v. Urlin, 158 U. S. 271;
Grand Trunk Ry. Co. v. Ives, 144 U. S. 433;
Erie Railroad Co. v. Winter, 143 U. S. 74;
Ayres v. Watson, 137 U. S. 603;
Van Gesner v. United States, 153 Fed., 46 to face page 56.

Perhaps no more accurate case for comparison can be found embodying the essentials of a conspiracy charge with which in every particular the charge of the Court below compares, than that found in

United States v. Cole, 153 Fed., page 802,

which in fact is based upon *United States v. Goldberg,* Fed. Cas. No. 15,233.

As is well said by the Court in the *Ware* case, 154 Fed., page 585,

"As circumstances might have existed which would have rendered such declarations, admissions, or conversations admissible in evidence, as where they were repeated to and confirmed by the defendant, or where they were admitted without objection or exception by the defendant, or were introduced by the defendant, or were drawn out by proper cross-examination of his witnesses, counsel have failed by a mere exception to this portion of

the charge, without any request to exclude the specific evidence challenged, to overcome the *prima facie* presumption which always exists that the action of the Court below was right."

The entire charge of the Court in this case appears in the record at pages 1049 to the top of page 1078 and when it is read in its entirety it covers fully and fairly every question presented under the issues and theories of the prosecution and the defense. After the Court had explained the issues to the jury and defined a conspiracy it used this language:

"The statute of the United States read to you requires not only that it shall be proved beyond a reasonable doubt that such an unlawful combination has been entered into, and that it was to commit an offense as charged, but that one or more of the parties to the conspiracy has done an overt act to affect the object of the conspiracy. There is, therefore, something more required than a mental purpose to authorize a conviction in a case of this kind."

Transcript of Record, page 1056.

Then after instructing the jury upon the matter of the design we come to that part in which counsel for plaintiffs in error endeavored to make it appear, under their objection to the word "positive" (See their brief, page 134; Trans. of Record, page 1078), that the Court ought to have said "direct" evidence, and we find that the Court used the following language:

"Positive evidence entirely in proof of a conspiracy is not necessary to be had. From the nature of the case, the evidence frequently is in part circumstantial. So, though the common design is the essence of the charge, it is not

necessary to prove that all of the parties charged met together and came to an explicit and formal agreement for an unlawful scheme, or that they did directly by words or in writing, state to each other what the unlawful scheme was to be, and state to each other the details of the plan or means by which the unlawful combination was to be made effective; that is, it is not necessary that that should be shown by DIRECT EVIDENCE, etc."

Transcript of Record, page 1057.

But the Court, to make it doubly certain, subsequently used this language:

"The Government is not required to furnish *direct evidence* of the conspiracy or of the knowledge or intent of the defendants or either of them, but the conspiracy, knowledge or intent of the defendants may be established by circumstantial evidence *if sufficient* for that purpose."

Transcript of Record, page 1058.

Then the instruction was given, usual in all cases, depending upon circumstantial evidence. The Court positively instructed the jury that their deductions from the evidence must exclude every other hypothesis but the single one of guilt.

Transcript of Record, page 1059.

The Court then said:

"The presumption of law is that the defendants are innocent until they are proven guilty by competent evidence beyond a reasonable doubt."

Transcript of Record, page 1059.

The balance of the charge is concerned with the homestead laws and the laws under which the entries were to be made, the essential requirement among which is that of good faith, and finally submits to the jury the definite questions as charged in the indictment for their determination, telling them that that determination must be governed by the rules given them in the general charge together with that defining reasonable doubt. The Court, moreover, even instructed the jury that the contracts made by Jones, if under the circumstances explained he acted through and within compliance of the law, would not be sufficient to render him guilty; and takes up the very matter most complained of by counsel on the proposition that no part of the general charge covers the authority of Wells to act, but on this subject the Court said:

"By itself, if this were true, it would not be wrong unless it was a part of a plan to secure the title of the land by false and fraudulent proof of the homestead entry and settlement as alleged in the indictment, that is to say, THE DEFENDANT, JONES, WOULD NOT BE RESPONSIBLE FOR FALSE PROOF OF SETTLEMENT AND ENTRY IF HE DID NOT INTEND THEM OR AUTHORIZE THEM TO BE MADE."

Transcript of Record, page 1073.

After further instructions the Court then gave this instruction:

"Under the indictment, you may, as you find the evidence warrants, find all three of the defendants guilty, or not guilty, or that two of the defendants are guilty and some one of the defendants is not guilty."

Transcript of Record, page 1077.

It is obvious that the jury understood this charge in its entirety, for the obvious reason that they convicted Jones and Potter and acquitted the other defendant, Ira Wade.

In conclusion we reach the point on which counsel seem to bend their most strenuous effort. This matter is simply this: The government contended on the trial that the jury could find a conspiracy at any time from September 3, 1902, and prior to the commission of the last overt act, which was May 5, 1904, while the defendants contended that no conspiracy could be found by the jury unless the time was limited between the second and fifth days of September. The entire charge of the Court, Transcript of Record, pages 1070 and 1071, should be read in connection with the question presented at pages 140 and 143 of the brief of counsel for plaintiffs in error.

The plain fact is that the court's instructions submitted to the jury whether a conspiracy *existed* at all and then told them that if a conspiracy was entered into and *existed* at all they would have to go further and find beyond a reasonable doubt that the overt acts charged in the indictment were done by one or more of the defendants as charged for the purpose of effecting the object of the conspiracy. (Transcript of Record, page 1071.)

In other words, the proposition was this: You must first find that a conspiracy *existed*. Then you must go farther and find that pursuant to that conspiracy overt acts were committed. You must find these overt acts were committed while the conspiracy *existed*. And you must find all these facts from the evidence, satisfying your minds beyond all reasonable doubt.

We called attention in the prior pages of this brief to the expressions of the *Circuit Court of Appeals for the Fifth Circuit* upon this question. It is a *per curiam* opinion and a petition for a rehearing was denied. Judges McCormick, Shelby and Newman delivered the opinion in which they say, 152 Fed. 619:

"It need not be proven that the conspiracy was formed and begun at the date given in the indictment. THE ESSENTIAL POINT IS THAT THE CONSPIRACY *EXISTED* BEFORE THE DATE OF THE OVERT ACT ALLEGED AND CONTINUEED TO EXIST AT THE TIME THE OVERT ACT WAS COMMITTED."

As was said by this Court in *Dimmick v. United States,* 135 Fed., page 271,

"The charge of the Court not only covered every legal point involved in the case, but was in all respects clear and the language used was as strong and favorable in favor of the defendant as the law would warrant and bears evidence that the Court in its charge carefully guarded the rights of the plaintiffs in error."

In conclusion, an inspection of the record will disclose that the larger part of the Court's charge is made up of language contained in the requests of counsel for plaintiffs in error. They should not now complain because of the result.

ARGUMENT

We have so copiously quoted from authorities that little room is left for argument and considering the importance of the case the Court may be better satisfied to examine the authorities and deduce its own conclusion. But as the case is of great importance to the government it has been deemed a possible aid to the Court to point out some of the main features which might be forgotten or overlooked in oral argument.

Counsel for plaintiffs in error have consistently failed to appreciate, as it would appear, that they were trying this case in a Federal Court.

In the first pages of this brief we have called attention to *the rule that in criminal cases in the Federal Courts State laws and practice do not control and have no application.*

Having devoted considerable quotation of authority to the subject of the error assigned on *the motion to quash,* it suffices to point out here that it is deemed by counsel for the United States that the decisions of this Court in *Ball v. United States* and in *Shelp v. United States* are conclusive of the question there raised. So far as counsel for plaintiffs in error have based their ground upon citation of State cases, we conclude that the rules established by the decisions of the Ninth Circuit are controlling. It is not essential that all the witnesses called to testify shall be named on the foot of the indictment in a case of this kind.

This brings us to the *plea in abatement.* Under the *Cobban case,* 127 Fed. 713, it does not do to assert prejudice, but the facts from which the prejudice is claimed to

arise must be shown. Counsel filing the plea doubtless endeavored to do this, but a plea in abatement in no respect negatives the fact that *the necessary number of jurors required under the Federal Statutes* to concur in the finding of the indictment *did in fact concur* in the indictment filed in this case; and it seems to us that is an end of the question. Irregularities, if there are any, at this stage of the case have been cured by the verdict. The Federal Statutes so state, for it must be something beyond mere defect of form and something which operates to the substantial prejudice of the defendant before the Appellate Court after verdict and judgment rendered will interfere. In conclusion on this point it is to be noted that nowhere in the plea does it appear that there was any final adjournment of the Court of which the grand jury returning the indictment was at that time the arm. Hence there was no objection to their meeting and adjourning at their convenience. There being no other points presented in the argument or plea, we conclude that this assignment of error is not sufficient to interfere with the judgment.

Next for consideration arises *the demurrer to the indictment,* to which indeed we have devoted the most searching examination and the most prodigal citation of authority to aid the Court in its conclusion. There is only left to say, in connection with the authorities hereinbefore cited, that this indictment charges the following apparent, plain facts and circumstances constituting the offense and within the authorities it is certainly sufficient:

This indictment naming the plaintiffs in error together with others, alleges and charges among other things:

I.

THAT THE PLAINTIFFS IN ERROR ON THE 3D DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT, DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

III.

Those certain portions of its public lands situate, lying and being within the State and District of Oregon *which were open to homestead entry under the land laws of the United States AT THE TIME the respective homestead filings hereinafter mentioned were made thereon* at the local land office of the said United States at Oregon City in said State and District of Oregon.

(Here follows a description of the land, together with the names of the entrymen who made such homestead filings and the date upon which such filings by such entrymen were made.)

Transcript of Record, Pages 14, 15 and 16.

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants, Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESIDENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID

LAND SO FILED UPON BY HIM FOR THE PURPOSE OF SPECULATION AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

Transcript of Record, page 18.

VII.

(1) AND THAT IN PURSUANCE OF SAID CONSPIRACY AND TO EFFECT THE OBJECT THEREOF SAID DEFENDANTS JONES AND POTTER DID CAUSE AND PROCURE DANIEL CLARK TO MAKE A HOMESTEAD PROOF,

Transcript of Record, pages 19, 20 and 21.

AND A FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS,

Transcript of Record, pages 23 and 24.

AND THAT THE DEFENDANTS AND EACH OF THEM WELL KNEW THAT THE HOMESTEAD PROOF SO SUBSCRIBED BY CLARK AND HIS ANSWER TO QUESTION NUMBER 5 THEREIN WAS FALSE IN THAT CLARK NEVER RESIDED UPON THE LAND AT ALL.

(2) That Ira Wade on the 5th day of September, 1902, certified to the foregoing testimony of Clark.

Transcript of Record, page 25.

(3) That on the 5th day of September, 1902, the defendants Jones and Potter caused, induced and procured Addison Longenecker to make final proof before Wade,

Transcript of Record, pages 25, 26, 27, 28-30.

and that said defendants Jones, Potter and Wade and each of them well knew at the time such homestead proof was so subscribed by Longenecker that his answer was false to question number 5, and that said Addison Longenecker had never resided upon said land at all.

(4) That on the 5th day of September, 1902, Ira Wade certified to the foregoing testimony of Longenecker.

(5) That defendant Willard N. Jones on the 5th day of May, 1904, did cause and procure the following letters and affidavits to be sent to the Secretary of the Interior by Charles William Fulton, there and then the duly qualified and acting United States Senator for the State of Oregon, setting out the said letter of Fulton

Transcript of Record, page 32.

the letter of Jones dated April 23, 1904, referred to in the Fulton letter of May 5, 1904,

Transcript of Record, pages 33 to 39.

the agreement between Jones and the entrymen,

Transcript of Record, pages 39 to 42.

attached to which there will be observed a confirmatory affidavit sworn to by Jones before George Sorenson under date of the 23d day of April, 1904, in which Jones, a plaintiff in error, makes the following statement of fact:

"THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE FULL AGREEMENT SIGNED BY ADDISON LONGENECKER, DANIEL CLARK AND GEORGE F. MERRILL AND THAT THERE WAS NO OTHER VERBAL OR WRITTEN AGREEMENT EXPRESSED OR IMPLIED WHEREBY THEIR HOMESTEAD CLAIMS WOULD INURE IN WHOLE OR IN PART *TO ME,* EXCEPT AS IS STATED IN THE FOREGOING AGREEMENT."

Transcript of Record, page 43.

The indictment then concludes with the usual charge against the peace and dignity, etc., signed with the proper

officers AND WITH THE NAMES OF THE WITNESSES ENDORSED THEREON.

Furthermore, as we have pointed out, at this stage of the case an indictment receives a liberal construction and after a verdict it receives the aid that results from the consideration of twelve men who determined upon the evidence introduced thereunder the truth of the facts charged therein. It is not the question that the indictment could have been better; it is not the true test that it might probably have been more certain and definite. But now it is the consideration whether substantial justice has been accomplished; *whether the substance of the crime could adequately be understood from the indictment;* whether the defendants went on trial with that understanding, and whether after full consideration of all its clear and substantial averments it puts before the defendants substantially the charge which they were called upon to meet. The evidence in this case showed a detail of facts and circumstances involving both the plaintiffs in error—involving them separately and collectively. *These facts and circumstances were clearly referable to a preconceived design of the actors.* The jury has said that there was a moral probability that these facts and circumstances would not have occurred without a preconcertive action and *the jury have said that beyond a reasonable doubt they are satisfied that the conspiracy alleged in the indictment was formed and conducted as alleged.*

Peters v. United States, 94 Fed. 130.

Van Gesner v. United States, 153 Fed. 46.

It is the essence of the thing in the administration of justice. When the indictment advises the defendant with

reasonable certainty and fairness what he is charged with, it fulfills all the requirements of the law. Perhaps more could have been set forth, but enough was said to apprise the defendants so they could make a defense. They did make it. The jury did not believe it.

In final analysis, the *general features of the case* can only be incidentally considered. There are so many phases of the case raised by the assignments of error, that we must again invite attention to the fact that without specification of the errors in the brief we could not be expected to meet all the branches of the case. We must ask that counsel be confined to matters specifically referred to in their brief only. This done we turn to those cases cited by counsel on the subject of the statute of limitations.

United States v. Owen, 32 Fed., and *United States v. McCord,* 72 Fed., together with *Ex parte* Black, 147 Fed., are the cases relied on by counsel for plaintiffs in error to establish their view of the application of the statute of limitations to the *"statutory offense of conspiracy."*

The first case was decided by Judge Deady at a time and under circumstances when very little attention was given to the conspiracy statute or to cases arising thereunder. *United States v. Dence,* in 3 Woods, and *United States v. Donau,* 11 Blatchford, then, together with *United States v. Goldberg,* 14 Meyer Fed. Dec. 41, 42 (Fed. cases 15,233) were extant and sound law, yet they were not considered; perhaps not even searched for. There was no effort in the earlier cases to consider authority. Each judge seemed to start with the doctrines of common law conspiracy and concluded thereon as it suited him or the case without regard to the *offense* characteristically desig-

nated as a "statutory offense, containing elements additional to common law concepts of conspiracy."

When the Ware (Marie Ware) and Puter cases came on before our now revered Judge Bellinger, then sitting as District Judge, counsel for defendants made great effort to establish the principles of *United States v. Owen* as the law. But Judge Bellinger had read. He knew. In the Puter cases he refused to follow Judge Deady. He held that the statute did not run as claimed, but if at all from the *last overt act only.* Judge DeHaven, at first, was not clear on this view, although sitting in this district; but *United States v. Brace,* 149 Fed. 874, is clear to the point that he changed his mind, as great jurists occasionally do, and adhered to the view of the law more in consonance with sound principles and the weight of authority.

It is also to be remembered that from the time of the *Owen* case, that the *"statutory offense of conspiracy"* was more frequently prosecuted, in respect of its feature *"to defraud the United States in any manner or for any purpose."* So, by the time the first conspiracy cases were in 1904 brought on for trial in Oregon there was a well defined channel for legal thought to mold and deepen to a strong river of authority before it was dried and cracked by archaic contemplations of a common law crime applied to a more modern statutory offense with added elements. So, the jurists set their respective vessels afloat. The result, from *United States v. Greene,* in 115th Federal to *Ware v. United States* in 154th as we find the cases now, runs concurrently through thirty-nine (39) volumes of our Federal Reporter without so much as a break among the different *Circuit Courts of Appeals* throughout the many

circuits from which we have picked the cases. And this trend of authority is fixed and fastened in approval and affirmance of the opinions of District and Circuit Courts in the several circuits below who had the courage to remain convicted to sound principle.

The Bunn decision in *United States v. McCord,* as well as *Ex parte Black* are now both before the Circuit Court of Appeals for the Seventh Circuit in the two appeals prosecuted there recently from the decision of Judge Quarles in 147 Federal in the Black case. The writer has just presented these cases in that Court of Appeals with the confident expectation that Judge Grosscup and his associates will declare the law as contended for here, and as already declared in this circuit. The *Ware* case was decided since these appeals were taken in the Black cases, and the sound doctrine of that case, coupled with the Bradford case, should go far to annul the subtleties of reasoning based on common law doctrine applied to a statutory offense which is *sui generis* in the law.

The McCord case came up from Wisconsin before Judge Bunn and to show the circumstances surrounding this decision to which counsel in other Government cases attach importance we quote a characteristic remark:

"In this case there was an indictment against Warren E. McCord and others charging that on the 23d day of October, 1891, they unlawfully conspired together and with divers other persons to defraud the United States of its title and possession and dominion over certain unappropriated lands belonging to the United States, which were fully described in the indictment. The case was tried before a jury, and was elaborately and thoroughly

argued by able counsel for both sides, Mr. Briggs and Mr. James G. Flanders representing the United States, and Spooner, Sanborn, Kerr & Spooner, Charles Felker and Lamoreaux, Gleason, Shea & Wright for defendants."

(Quotation from brief of appellees in Black cases appealed).

Wisconsin has been denuded of its timber. Titles passed in that state on receivers' receipts, as accustomed to do for some years in a few other states. If an entry, however fraudulent, reached that stage, its purpose was accomplished, for purchasers accepted the titles. There was reason therefore to cut off a conspiracy case *as close up to the entry as possible.* If counsel could prevail upon the court by the influence of their standing and reputation, their subtlety and their metaphysics to such a result it was to prevent wholesale prosecution in Wisconsin for the denudation of the landed empire of the people of the United States.

Bolstered up with the McCord case doctrine the Wisconsin dealers in timber then sought, through their local representatives and by themselves, with avaricious audacity the virgin forests of Oregon, and the results occupy a page in the annals of Oregon's historical commercialism only interrupted by the land fraud prosecutions. But for these, Oregon would be the photograph of Wisconsin.

As in the Black cases, so here, we are contending for the enunciation of a doctrine which at least in this circuit will forever quiet false doctrines and opinions of necessity against the interests of the whole people.

In the case at bar same argumentative objection has been made by plaintiffs in error on the admission of evi-

dence of a character denominated by them as *"trifling"* and *"as immaterial to the charge in the indictment."*

We have at length pointed out in previous remarks grounded on authority of cited cases the doctrines bearing upon "collateral facts" as evidence received in a case of this character. To the point last referred to, however, we give as authority the rules announced by the Supreme Court.

In *Holmes v. Goldsmith,* 147 U. S., page 150, a case which went up from the District of Oregon to the Supreme Court of the United States, and was argued by John H. Mitchell for plaintiffs in error, and by L. B. Cox for defendants in error, the Court, speaking through Justice Shiras, said, at page 164:

"That Owens could, in the opinion of the expert, have as readily counterfeited the handwriting of Jones as that of the defendant Holmes seems to be fanciful and entitled to little or no weight. If these offers had been rejected by the court, such rejection could not have been successfully assigned as error. Still we cannot perceive that the case of the defendants was injured by the admission of this trifling evidence. As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend,

even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.'

"The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

On similar considerations the *Circuit Court of Appeals for the Eighth Circuit* enunciated the same doctrine and applied it to a conspiracy case, in *Olsen v. United States,* 133 Federal 849.

See the opinion of the Court at pages 854 and 856 and 857 of the 133d Federal.

From the very nature of the statutory offense of conspiracy *results the conclusion* that in and of itself it consists of a series of acts set on foot by the agreement impulse or intermittent force of design originally conceived.

Much more is this so under the law as it stands. For we have not only the essentials of a common law conspiracy, mutual assent, conscious participation, in a word, the "conspiring" coupled with the purpose sought, *but we also have the additional statutory requirement before a prosecution can be had,* all acts done by either or any of the parties to call into execution and effect the ultimate purpose conceived.

The most fruitful source of nicety of distinction, subtlety of argument and technicality of presentation consists in

constantly referring to Section 5440 as if it comprehended common law conspiracy only. But it seems that a more happy terminology might be used by designating Section 5440 as **"the statutory offense of conspiracy."** So considered, *the offense consists of the original plot and design and the acts done by either of the parties to carry it into execution.* Otherwise no prosecution can be had. It is the offense that the statute defines. The component parts of it cannot be justly severed and an argument fairly based upon the doctrines of common law conspiracy alone. The common law conspiracy has been changed by the statute of the United States. It must therefore be immaterial how long a time the performance of acts may continue so long as the acts in question go to the ultimate accomplishment of the original design, however remote its end.

So, by the very nature of things entering into its makeup, the statutory offense of CONSPIRACY is continuous and is a continuing offense. Its process of execution is manifested by overt acts.

As pointed out in the *Newton* case, hereinbefore cited, guilty participation ensues from the very fact of antecedent acts performed in contemplation of the ultimate design and understanding which thereby ripens the statutory offense prescribed by the law.

It is familiar law that it is immaterial whether the conspirators gain any pecuniary object. It is also immaterial whether the object of the conspirators is attained. Whether, indeed, anything is accomplished or not. Suffice it to satisfy the statutory essentials that there has been a plan "to defraud the United States in any manner or

for any purpose," and an act committed in furtherance of the design.

Counsel for plaintiffs in error would have us believe that the Government was in no way deceived, but, as has been pointed out, some of the very entries referred to upon page 77 of their brief were actually commuted entries and the commutation was availed of under the law of January 26, 1901. In the *Stearns* case, hereinbefore cited, it was pointed out that even to secure the entry by feint of complying with the law was to secure that entry fraudulently and therefore to defraud the United States. In the *McGregor* and *Curley* cases it is made clear that even to interfere with the administrative operations of the Government is a fraud upon the United States. Judge Parlange, in the part of his opinion which we have hereinbefore quoted, says, referring to the statute:

"It uses the broadest possible language, it punishes all "who conspire to defraud the United States 'in any man-" 'ner and for any purpose.' It is certainly just as import-"ant that the Government should not be defrauded with "regard to its operations even if no pecuniary value is "involved as that it should not be defrauded of its prop-"erty."

If this is not the law, why do courts constantly reiterate it? In the *Ware* case Circuit Judge Sanborn, as shown by the quotations hereinbefore made, points out that the purpose of the homestead laws is to induce settlement and cultivation and that any agreement comprehending a division of the estate which the homestead applicant is to acquire is inconsistent with the purpose and spirit and violative of the provisions of the laws of the United States.

In fact he stamps these agreements as contracts to make the applicants but the mere agents for others who do not desire the lands for homestead purposes at all. (See 154 Fed., page 584). Judge Van Devanter lucidly discusses the same proposition and stated for the Court that he could not assent to the contentions made there for the plaintiffs in error, which are the same contentions identically as are made here, namely, that the United States has not been deceived.

As before stated, all of the evidence is not in the record. *It must therefore be presumed that there was other and equally important and convincing evidence before the jury.* From so much of the evidence as is in the record it is morally certain, as shown in previous pages of this brief, that there was joint assent of the minds of Jones and Potter and Wells and others, and a conscious participation on the part of both Jones and Potter in the *purpose* upon which they engaged and the *means that they employed to execute it.* There is no escape from this proposition. Counsel for plaintiffs in error attempt to excuse this by now saying, "Well, but there was no guilty assent or guilty participation; if they did participate in everything that was done, the United States was not deceived." This fallacious argument seems to be based upon the fact of the alleged requirement of three years' actual residence to obtain these lands on the Siletz. But an inspection of the entries which they have cited and an examination of the record show that a great many of *the claims were commuted.* More importantly does it appear that they first attempted to avail of the deductions in time for "actual residence" which would ensue under the soldiers and

sailors provisions of the homestead law. When it was ascertained that the Commissioner would not allow such deductions, what then was the next available step under the acts whereby they could shorten such term of residence? *Why, it was commutation.* It is evident that this was availed of. In the brief of plaintiffs in error we find the following citations:

"The proof of James Landfair, Govt. Ex. 127, page 473, shows that he established residence in October, 1900, filed June 18, 1902, and made final proof September 2, 1902."

"The proof of Louis Paquet, Govt. Ex. 142, page 499, shows that he settled on the land on November 15, 1900, and it appears from the indictment that he filed on the same on the 3d day of October, 1900."

"The proof of William T. Everson, Govt. Ex. 344, page 792, shows that he settled upon said land in October or November, 1900, that he filed upon the same March 2, 1901, and final proof made September 2, 1902."

How could a man settle in 1900 and prove up in 1902 under the homestead act? How can a man file in 1902 and prove up the same year under the homestead act without previous residence for the time required by the act? These questions answer themselves.

From an examination of the exhibits in the record and the various entries comprehended in them it will be observed that act after act was committed within three years of the time charged in the indictment, but notwithstanding, counsel for plaintiffs in error contend that if the conspiracy was started precedently three years prior to the indictment and a single act in aid of its object committed, then the offense was barred, or, in other words,

there was no offense. But it is through the repetition of such acts—"overt acts, as they are commonly called"—"A CONSPIRACY IS MADE A CONTINUING OFFENSE. BY EACH SUBSEQUENT ACT IT IS REPEATED AND ENTERED INTO ANEW."

United States v. Brace (Judge DeHaven), 149 Fed. 875.

This Court had practically the same contentions before it in the *Van Gesner* case (153 Fed. 46) in respect of objections to evidence and rulings thereon.

This Court held that evidence of other acts disconnected with the conspiracy charged in the indictment was admissible for the purpose of showing knowledge, intent, system, design and motive.

This Court in that case moreover held that acts connected with the matter charged in the indictment were competent overt acts, whether alleged or not, referable to the joint design and a renewal of the original conspiracy.

So, in the *Van Gesner* case, this Court in effect reached the same result as the *Circuit Court of Appeals for the Fifth Circuit* in Bradford v. United States, 152 Fed. 19.

If the jury were satisfied that a conspiracy *existed* at any time an overt act charged was committed, then the offense was complete, and the verdict was justified. If the conspiracy did in fact *exist* before the commission of any overt act charged, then it follows the jury finding that fact in existence looked farther to find if it continued to exist at the time of the commission of acts charged as an overt act. That is only to say was the conspiracy then alive. *"Continued"* in fact is one thing. *"Continued"* in its other aspect is a matter of law. We are dealing here

with continuation as a series of facts. We have shown herein under the authority of many cases that *all* acts as overt acts committed or done in furtherance of the conspiracy need not be alleged.

This discussion would not be complete without calling attention to the doctrine counsel for plaintiffs in error advance against this indictment in this case based on their discussion of *"means."* To thoroughly view this question without cavil we must ask the Court at the expense of repetition to look again at the indictment in the following particulars:

I.

THAT THE PLAINTIFFS IN ERROR ON THE 3D DAY OF SEPTEMBER, 1902, AT AND IN THE STATE AND DISTRICT OF OREGON AND WITHIN THE JURISDICTION OF THIS COURT, DID UNLAWFULLY CONSPIRE, COMBINE, CONFEDERATE AND AGREE TOGETHER

II.

KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE SAID UNITED STATES OUT OF THE POSSESSION AND USE AND THE TITLE TO

IV.

(a) BY MEANS OF FALSE, ILLEGAL AND FRAUDULENT PROOFS OF HOMESTEAD ENTRY AND OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY BY SAID ENTRYMEN RESPECTIVELY, AND

(b) BY CAUSING AND PROCURING SAID RESPECTIVE ENTRYMEN TO MAKE FALSE AND

FRAUDULENT PROOFS OF SETTLEMENT AND IMPROVEMENTS UPON SAID LANDS RESPECTIVELY, AND

(c) THEREBY TO INDUCE THE SAID UNITED STATES TO CONVEY BY PATENT SAID PUBLIC LANDS TO THE SAID RESPECTIVE ENTRYMEN WITHOUT ANY VALID OR SUFFICIENT CONSIDERATION THEREFOR.

V.

Said defendants Willard N. Jones, Thaddeus S. Potter, Ira Wade, John Doe and Richard Roe, THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WERE NOT ENTITLED THERETO UNDER THE LAWS OF THE SAID UNITED STATES BY REASON OF THE FACT THAT THEY AND EACH OF THEM HAD UTTERLY FAILED AND NEGLECTED TO EVER ACTUALLY RESIDE OR SETTLE UPON SAID LAND FOR ANY PERIOD OR PERIODS OF TIME WHATSOEVER, OR EVER FAITHFULLY OR HONESTLY ENDEAVORED TO COMPLY WITH THE REQUIREMENTS OF THE HOMESTEAD LAW AS TO SETTLEMENT AND RESIDENCE UPON OR CULTIVATION OF THE LAND SO FILED UPON BY EACH OF THEM.

VI.

The defendants Jones, Potter and Wade THEN AND THERE WELL KNOWING THAT EACH OF SAID RESPECTIVE ENTRYMEN WAS ENTERING SAID LAND SO FILED UPON BY HIM **FOR THE PURPOSE OF SPECULATION** AND NOT IN GOOD FAITH TO OBTAIN A HOME FOR HIMSELF.

In addition to the matters offered in the discussion of the authorities on the subject of "means," within the above cited particulars the following considerations suggest themselves.

"Speculation." The indictment charges that the plaintiffs in error *well knew* that each of said respective entrymen was entering said land so filed upon by him for the *PURPOSE OF SPECULATION,* and not in good faith to obtain a home for himself.

To defraud the United States is of itself a *"criminal and unlawful purpose."*

It is only where the purpose sought is not of itself criminal and unlawful that the means must then be set out, and such means must be criminal or unlawful.

It may be true that to obtain a homestead is a commendable pursuit and altogether lawful. But to defraud the United States to obtain a homestead is certainly unlawful. To make an entry for *speculation* and not in good faith to obtain a home is against the law.

It is a specious, nice and subtle argument which then puts forth and attempts to engraft the requirement that it is *then* the unlawful means which constitutes the crime.

"In law what plea so tainted or corrupt,
"But the sound of a gracious voice doth obscure the show of evil?"

Counsel have even misquoted the allegations of the indictment. They use the indefinite expression as a quotation, *"certain entryman."* (Their brief, supposed page 28). More particularly *"by causing and procuring certain entrymen to make false proof of settlement and improvements."* The indictment, however, says, see paragraph IV, division "Argument" this brief (Transcript of Record, page 18), where the record is copied:

"By causing and procuring said respective entrymen," etc. This is a definite class, named in the indictment. *"Certain entrymen"* exhibits indefiniteness of statement and want of certainty. The indictment describes the very entryman in each instance and specifically refers to them thereafter as *"said respective entrymen."* A terminology singularly specific and definite in a case of this character.

The pleader under the statutory offense of conspiracy has several different methods of charging the crime open to him. (1) To defraud the United States in any manner or for any purpose. (2) To commit an offense against the United States. This latter in turn is and may be divided into as many points of attack as the facts in question involve or comprehend violation of the laws of the United States. Perjury, subornation, forgery, bribery, customs and revenue violations and so forth. In these respects the mind cannot conceive of a crime involving common law essentials which would not involve unlawful means or criminal means in its commission. So with more or less exactness the means, depending upon the circumstances of each case of this independent criminal character of *itself* must appear.

But in a proceeding to reach facts such as were disclosed in the *Curley* and *McGregor* cases, where the United States is defrauded in any manner or for any purpose, the very fact of such purpose as the design and conception of the plot and plan *renders such purpose a criminal purpose* under the statutory offense of conspiracy, and "means" cease to become material. The very purpose is criminal if from what is stated of it, it is "to defraud the United States in any manner or for any purpose."

This indictment as pointed out charges the purpose of the plan and combination

"KNOWINGLY, WICKEDLY AND CORRUPTLY TO DEFRAUD THE UNITED STATES."

That was the purpose. The "means," and the only means then which are thought of is: How was this to be accomplished?

But we do not under the cases find one which requires the indictment to show accomplishment, or that the conspirators could or did succeed, or that any benefit would result. On the contrary, it is found in such a case to be immaterial whether the plan was effective or not.

Even in the case where a substantive crime is involved in the plot, or in the means of accomplishment in a proper case, it is held that the pleader is not required to set out the particulars of that crime with the degree of certainty and exactness required in an indictment for the crime itself.

United States v. Wilson, 60 Fed. *supra;*
Ching v. United States, 118 Fed. *supra.*

A fortiori, then, where the statute itself creates the offense of conspiring to defraud the United States, the facts alone which with reasonable fairness and certainty inform the defendant of that charge and of matter sufficient to show his conscious participation therein, satisfy every requirement prescribed by law.

On the whole case it is therefore submitted no substantial right of the plaintiffs in error has been denied, nor has any action or ruling of the trial court operated to their prejudice. They have had a fair trial on an indictment in the essence of things fully and fairly apprising

them of the charge which they were called on to meet. With all the ingenuity and art of able counsel they exhausted every step to prevent an issue of fact, but finally pleaded "not guilty," and on that issue went to the tribunal with all their capabilities alive to their defense. The jury found them guilty as charged. Now after verdict every reasonable presumption is indulged that the verdict was right; and confident that exact and substantial justice has been done we submit the case finally to this Court expectant of a judgment of affirmance.

Respectfully submitted,

FRANCIS J. HENEY,

Special Assistant to Attorney-General.

WILLIAM C. BRISTOL,

United States Attorney for Oregon.

Attorneys for Defendant in Error.

Portland, Oregon, October 28, 1907.